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A MORE EFFICIENT AND EFFECTIVE GOVERNMENT: IMPROVING THE REGULATORY FRAMEWORK

HEARING

BEFORE THE

SUBCOMMITTEE ON THE EFFICIENCY AND EFFECTIVENESS OF FEDERAL PROGRAMS AND THE FEDERAL WORKFORCE

OF THE

COMMITTEE ON
HOMELAND SECURITY AND
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

MARCH 11, 2014

Available via the World Wide Web: http://www.fdsys.gov

Printed for the use of the Committee on Homeland Security and Governmental Affairs

U.S. GOVERNMENT PRINTING OFFICE
88–281 PDF WASHINGTON : 2014

For sale by the Superintendent of Documents, U.S. Government Printing Office
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A MORE EFFICIENT AND EFFECTIVE GOVERNMENT: IMPROVING THE REGULATORY FRAMEWORK

TUESDAY, MARCH 11, 2014

U.S. SENATE,
SUBCOMMITTEE ON THE EFFICIENCY AND EFFECTIVENESS OF FEDERAL PROGRAMS AND THE FEDERAL WORKFORCE,
OF THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS,
Washington, DC.

The Subcommittee met, pursuant to notice, at 2:32 p.m., in room SD–419, Dirksen Senate Office Building, Hon. Jon Tester, Chairman of the Subcommittee, presiding.

Present: Senators Tester, Pryor, McCaskill, and Portman.

OPENING STATEMENT OF SENATOR TESTER

Senator TESTER. Good afternoon, and I will call this hearing of the Subcommittee on Efficiency and Effectiveness of Federal Programs and the Federal Workforce to order.

Senator Portman, the Ranking Member, will be here shortly. He is en route. I thought I would start with my opening statement, and then hopefully he will be here by the time I finish it. And then we will hear from the good Senator from Maine, Angus King, someone who has been dealing with this issue for a long time.

Today's hearing is entitled, "A More Efficient and Effective Government: Improving the Regulatory Framework," and I want to welcome all the witnesses that are going to testify on the three panels today. I want to thank them for joining us and sharing their perspective on this important issue.

Now, some folks would think that every regulation that comes down the pike is a bad regulation, just the Federal Government's latest attempt to stifle economic growth or expand its reach. I certainly do not agree with every regulation that has come out in this or previous Administrations, but I do believe that some have gone too far, although I also believe that some have not gone far enough. And I believe that far too often agencies issue or proposed a one-size-fits-all regulation that stacks the deck against potentially smaller businesses, in my case family farms and ranches.

Most recently I expressed my strong opposition to a proposal by the Food and Drug Administration (FDA) that would prevent small farmers from selling their products at farmers markets, and that treats groups of small farms like large corporations. Senator Hagan from North Carolina and I wrote an amendment to the Food Safety

and Modernization Act to make sure that small farmers selling directly to local consumers would not face the same regulatory burden and scrutiny as the large agribusinesses with nationwide supply chains and much higher risks. However, the FDA's first draft rules were not in the spirit of the Tester-Hagan amendment and would have forced many small producers to close up shop, despite the fact that it was large producers that caused the food safety concerns in the first place.

Another example is a proposed United States Department of Agriculture (USDA) rule that would turn over the role of government inspectors to company employees and allow facilities to process 175 chickens per minute. That is three per second, and a 25-percent increase. This rule would further advantage the biggest poultry plants and disadvantage the smaller facilities. In these two cases, you have one agency I believe overregulating the small guys and another agency cutting the biggest companies a break.

But let me be clear. Over the years, regulations have helped keep our drinking water clean, they have ensured our food is more sanitary and labeled more accurately, and they have led to dramatic improvements in workplace health and safety. While some regulations have grown increasingly irrelevant or costly over time and can no longer be justified, there are others that have been on the books for years and years but remain just as relevant today as when they were passed. For instance, the regulation of rail rates, which was initially driven by farmers back in the late 19th Century who faced extraordinary rates when they brought their goods to market, and it is still an issue today.

All you have to do is pick up a newspaper to identify another example or two of potential need for smart regulations, whether it is regulations on oil tankers, per the explosion in North Dakota a month or so ago, or 8.7 million pounds of diseased meat that may or may not have been distributed throughout this country.

In approaching the topic of regulations from an oversight perspective, I believe it is critical that we seek a better understanding of the regulatory process. Why do some rules clear the review process under the 90-day deadline while others get stuck in a pipeline for years? How can we bring more transparency and greater efficiency to the process?

The Administration has launched a lookback initiative to take a look at regulations already in place and identify those that are no longer relevant and what are some of the lessons we have learned from that. How can these lessons be incorporated to improve the regulatory process moving forward? These are some of the questions that we will be asking today.

It is great to be joined by Ranking Member Portman, and it is your turn for your opening remarks.

Senator PORTMAN. Thank you, Mr. Chairman. Could I ask unanimous consent if I could do my statement in whole after we hear from our colleague from Maine?

Senator TESTER. It is against my better judgment. I should object, but I will not. [Laughter.]

Yes, absolutely.

Senator PORTMAN. Before he goes, can I just say quickly, we are going to talk, I think, about the permitting legislation and to make

the point that this is legislation that is bipartisan, Senator Claire McCaskill and others, streamlines and improves the Federal permitting process. Right now a lot of uncertainty, unpredictability there. And make the point that last week the House of Representatives did pass that legislation. It is called the Federal Permitting— it is also called the Federal permitting bill. It is not precisely like our legislation. We think our legislation might be a little better in some respects. But it did attract some Democrat support in the House, and so just to say I really appreciate Senator King's willingness to come today and talk about that.

Senator TESTER. Thank you, Senator Portman.

Our first panel is Senator Angus King of the great State of Maine. Senator King has been a great advocate for commonsense reforms that help level the playing field for small businesses. I look forward to hearing from him on his ideas on how we can do more in that regard.

With that, Senator King, the floor is yours.

TESTIMONY OF THE HON. ANGUS S. KING, JR.,[1] A UNITED STATES SENATOR FROM THE STATE OF MAINE

Senator KING. Thank you, Mr. Chairman and Ranking Member Portman. Wonderful to have an opportunity to talk to you. I think this is a very important Subcommittee, and you are doing extremely important work. And what I would like to do is give you just a few minutes of my own background as it is relevant to what I am going to be talking about.

I once was introduced at a dinner, and the fellow went through my resume, and I got up and said, "The only conclusion I can take from that is that this fellow cannot hold a job," because I have had so many careers. I have been a lawyer. I have worked in public broadcasting. I have been a developer. I have been an entrepreneur, owned my own business. And I was also Governor of Maine for 8 years. And, in fact, when I was Governor, one of my primary focuses was on the regulatory process.

When I was elected, I would say it was fair to say that the most controversial and in some cases disliked agency in the State was, not surprisingly, our Department of Environmental Protection (DEP). Everybody had a story about the problems they had with the regulatory process. So I have experienced—and I have also been a board member of large companies and small companies, particularly in the financial services field, so I have seen how regulation right now, I think, is far overburdening small community banks and financial organizations.

What I would like to do is just run through very briefly four or five principles that I think need to be contemplated when we are talking about regulations and regulatory reform.

Principle Number 1 is we live in a competitive world. Everywhere in the world people are trying to take our jobs. Everywhere in the world people are trying to compete with our companies and put them out of business, if they can, and take our jobs to their country. That means that regulation has to be smart. We do not have the luxury of being able to impose regulations that are going

[1] The prepared statement of Mr. King appears in the Appendix on page 33.

to impose unnecessary costs on businesses in this country that leads to the business and the jobs being shipped overseas. That is a constraint that we have to have in the back of our minds at all times. We do not have a free range to regulate in any and all fields with no regard to what the costs of compliance are and what the costs of implementation are, because somebody wants our jobs right now, today, all over the world. That is Principle Number 1.

By the way, just to put a sharp line on that, a lot of people do not realize that in the last 10 years, 32 percent of the manufacturing jobs in the United States have been lost—32 percent, 42,000 factories have closed. Not jobs lost but factories closed. And when you lose a third of your manufacturing capacity in one decade, that is not evolution. That is not a minor change. That is a revolutionary destructive change, and I think I do not need to testify to you gentlemen about the importance of manufacturing. I am not saying regulation was necessarily all or a part of that, but the point is we are in an economy where we are going to have to compete. We do not own the world market anymore.

Principle Number 2, regulations have a cost, and not all regulations are created equal. One of the examples is the regulations that are currently starting to accumulate—"accrete" would be the word I would use—on the small financial centers, community banks. Androscoggin Savings Bank in Maine did not cause the great crash of 2008, but they are being burdened with piles of new regulations to issue simple home mortgages. One of the guys, my friend at one of the banks, sent me literally a stack of papers 2 feet high of regulations and forms that they have to comply with to do a simple home mortgage. That is having very deleterious effects.

First, it is pushing the smaller banks into the arms of the larger banks, which is not exactly what we want to do. We want a lot of small institutions.

Second, it is costing these banks money—I had a compliance officer from one of the community banks approach me on the street in Maine just a couple of weeks ago, and she said, "We are having to let go loan officers to hire compliance officers." And this is in a community small savings and loan association.

And, finally, it is having the effect of constraining credit, which is something our society needs right now, and these banks are not able to make loans for technical reasons because of regulatory reasons, even though they have good reason to believe that the borrower has good character and is able to repay the loan and meets any kind of reasonable criteria.

The other way to look at this—and there are lots of studies—and I am sure you have seen them, and in my written testimony I cite some of them—where there have been studies of the cost of regulation in a kind of meaningful statistic. And the one that I focused on is cost per life saved. A lot of regulations are protective—health regulations—and, for example, the analysis was—and this is in my written testimony. The regulation of unvented space heaters, which are dangerous, is about $100,000 per life saved. I do not think many of us would quibble with that as an important regulation. Asbestos occupational exposure limit, about $9 million per life saved. The atrazine-alachlor in drinking water standard, $109 billion per life saved. And the point being that we have really got to think

about what the cost versus the benefits are when we impose these regulations and that all regulations are not the same.

Principle Number 3, time is money. Cape Wind, which is applying for a permit to build—I cannot remember how many turbines, about 100 turbines in the waters between Nantucket and Cape Cod in Massachusetts, has been in the permitting process for 12 years, and the developer spent $65 million just to get the permits. Now, I do not think there is a system—I just do not know how anyone with a straight face can argue that this is a good system.

Now, we can argue about whether Cape Wind is a good idea or not, but some kind of decision should have been made somewhere short of 12 years and somewhere short of $65 million, because the developer—no rational developer will go to that extreme, and I believe in Cape Wind's case it is because Jim Gordon just said, "They are not going to beat me," and he decided as a personal matter he was going to stay in. But the economics of it are terribly daunting, and what we do not see, gentlemen, in these kinds of cases are the projects that never get brought forward, the projects that are eliminated and intimidated and excluded because people look at this process and say I am not going to put myself in for that, I am not going to go through that, or I cannot afford to go through that. And our country loses dynamism and loses opportunity, economic opportunity, and jobs.

One of the problems that we have—and this goes into the time is money, and I will talk a little bit about this and why I am announcing today that I am cosponsoring Senator Portman's bill. We have multiple regulators of the same essential thing. I do not know the details of the offshore wind project in the Nantucket Sound, but I know that we are talking about an offshore wind project in Maine that potentially is going to be regulated by the National Oceanic and Atmospheric Administration (NOAA), National Marine Fisheries, Coast Guard, U.S. Navy, the Federal Energy Regulatory Commission (FERC), and I am sure I am leaving several out. But when you have a situation like that where you have six or seven different regulators, by definition it is going to take a long time, and it is a crapshoot for the developer, because you can go to these permitting agencies one at a time, you go through, say, four, get your permit, spend $10 or $12 million, and then the fifth one says no and you are out of luck.

One of the things we did in Maine to deal with this problem, we created a one-stop shopping process where we had a lead agency, said this is the agency that is going to issue the permits, all the other agencies have to do their study, take their position, and report in to the lead agency. But the serial permitting is as bad as serial killing. It is a form of serial killing, I guess. And I will get to that in a minute.

Principle Number 4, attitude really is everything, and this is something we cannot get at through legislation. It would be really nice if we could legislate, "All regulators shall be reasonable, thoughtful, and have a positive attitude." I do not think we can legislate that. This is where the Administration comes in. This is called leadership and management. And in my experience, you can change attitudes within regulatory agencies. We did it with our Maine Department of Environmental Protection, but it took active

management and leadership from the commissioner that I appointed. When I took office in Maine, I was astounded to find—we have a 13,000-person workforce. The Governor had the appointment power over about 150 people out of 13,000. But people expect the Governor to change everything. And I said, "How am I going to change the DEP when I only can appoint three people?" But the people I appointed were on a mission, and their mission was to make this a user-friendly agency. And they had classes and seminars and worked with the personnel, and that attitude actually changed, and some of the very same people that had been so difficult before—and the attitude is: Is the regulator there to help solve problems and abide by the law? Or are they there to find problems? And that is what is so important, and I cannot stress enough what a difference that makes. And that is really not something we can do much about here, but I do think it is a matter of the Administration and the management of the Administration sending the message—which I did in Maine. I had a very clear message to the environmental agencies. I said, "I want to have the toughest environmental standards in the Nation and the most timely, predictable, and user-friendly process."

I do not think there is any inconsistency in those two things, but that message has to come from the management of the agency.

Principle Number 5 I do not need to spend a lot of time on, but it is one that sometimes arises: Abuse of the process is not an appropriate regulatory technique. In other words, I am very close to the environmental community in Maine. I used to represent them at the legislature. I have been a big advocate. I stayed up late last night talking about climate change. But I part company with anybody who wants to use the regulatory process in a kind of war of attrition just to wear down somebody that wants to do something in our society. Projects should be judged on their merits and not on who wins protracted legal battles. So those are the principles.

I have two problems and then two solutions, and I will be quiet. I notice, blessedly, my time thing is not running here, so that is a good thing.

No. 1, permitting is generally too costly and the process is too lengthy. We did an upgrade of our power grid in Maine where I think 96 percent of the project—this was the transmission grid. Ninety-six percent of the project was in existing rights-of-way or right adjacent to existing right-of-ways. Permitting that project took 4 years and cost $200 million. It was about a $1 billion project. So almost 20 percent of the cost of the project went into permitting, and basically it was, as I say, 96 percent of it was within the existing rights-of-way.

That is a cost that we are all paying, and the question is whether—do the people of Maine get value for that $200 million? Or was this something that could have been done in a more expeditious way? They had to go through a regulatory process in 70 towns. One town had over 30 meetings. I certainly do not want to be heard at this hearing saying I am against local control. I think it is totally appropriate. But I think that we need to be thinking about, what did the people of those towns in Maine get in exchange for the $200 million that it cost that project?

Can we find a way to permit major projects at a cost that is not extraordinarily prohibitive and within a reasonable timeframe without trampling on the legitimate rights of people who need to have their voices heard and contribute to the outcome of the project?

As I mentioned, we did something in Maine, we called it "one-stop shopping." I know that Senator Portman and Senator McCaskill have a bill, the Federal Permitting Improvement Act, which is establishing a lead agency, and as I understand it, Senator Portman, that is really the function, that is the direction you want to move in, a lead agency to coordinate the permitting process for major capital projects, those costing more than $25 million.

I would like to cosponsor that bill. I think that is exactly the direction that we have to go in. And it also has some reform of the litigation provisions on the National Environment Policy Act (NEPA) suits so the statute of limitations is not 6 years but is a more reasonable period of time and gives people a reasonable chance to appeal the decisions, but they cannot just wait 6 years and let the clock run and thereby cast a pall on the overall validity of the permits.

Major capital projects. I would like you to ask yourselves—and I think this is something that we all ought to do. The major piece of infrastructure in your State, whatever it is—interState highway, hydroelectric project, some major project, power project—ask yourself if that project could be permitted today. And if the answer to that question is maybe or no, then that illustrates that I think we have a problem in this country, because we cannot have our infrastructure be essentially a nostalgic photograph of what was built in the 1950s. We have to be able to improve our infrastructure, and we have to be able to do it in a timely and a reasonable cost way.

Problem Number 2, as I have already touched upon, is what I call regulatory accumulation. Regulations tend to have an eternal life, and they do not go away. I would commend to you the best book I have ever read about Washington. It is now out of print, but you can get it at Alibris or you could borrow it from me. It is "The Institutional Imperative: Or How to Understand the U.S. Government and Other Bulky Objects," by Robert M. Kharasch, who was a Washington lawyer in the 1970s. It is the most brilliant analysis of institutional behavior that I have ever seen, and basically, his basic principle, the institutional imperative is that the fundamental function of any institution is to perpetuate itself. And one of the examples he uses—it is written like a geometry textbook with laws, theorems, theories, and corollaries. One of the laws is the iron law of the security office. The iron law of the security office is if you create a security office, threats to security will be found. And that is an example of this kind of regulatory process. If you hire people to regulate, they are going to regulate. That is what they are going to do. And we need to find better ways to ensure that we revisit regulations on a regular basis. Roy Blunt and I introduced S. 1390, which basically is a Base Realignment and Closure (BRAC) Commission for regulation, and the idea is an independent analysis of regulations to come before the Congress with recommendations about whether they should be continued, modified, or eliminated. They would have an expedited process in Con-

gress, and this idea, by the way, came from the Progressive Policy Institute (PPI), and it has received quite a bit of positive attention.

In conclusion, as I said at the beginning, this is a very important Committee, a very important topic. I think it is one of the most important that we can do, particularly—I just came from a meeting with housing authority directors. We are in an age of zero-sum game when it comes to finances. Nobody is getting any more money. Therefore, one of the things that we have to look at is where we can relieve regulatory burdens to allow people to go further with the funding that they have, whether it is a housing authority, a community bank, or a business.

So I am delighted to have had the opportunity to meet with you this morning, and I apologize for going on so long, but this is a subject I feel very passionately about, as I hope you can tell. Thank you.

Senator TESTER. Well, I appreciate your comments. They are very insightful. And as long as you have consented to a few questions—this is actually very much out of the ordinary when a Senator comes to testify for a Committee. In fact, I believe this is the first time I have seen a Senator that would be willing to open themselves up to questions. And I had a whole bunch as you were talking through the principles.

I am just going to ask you about one, and it probably is not in any recent books, but it deals with the amount of money that is being pumped into campaigns, both sides of the aisle, and if you have any thoughts on the dollars to campaigns' impact on the regulatory scheme out there.

Senator KING. You mean in terms of regulations of other things?

Senator TESTER. In terms of influence.

Senator KING. I cannot remember who it was, but somebody some years ago said we have the only system in the history of the world where perfect strangers are expected to give you large sums of money and expect nothing in return. I think an inherently dangerous system for democracy, and it has become even more so in the last few years. I do not think we collectively have fully realized the vast qualitative change that has taken place in campaign finance just in the last 3 or 4 years since the Citizens United opinion and the rise of 501(c)(4)'s and the super PACs and the dark money. I think that is a subject we could really spend some time on.

I am not ready to allege corruption or direct connection or any of that kind of thing, but clearly it is not healthy for democracy to have that amount of money sloshing around in the system.

Senator TESTER. That is good. Thank you. Senator Portman.

Senator PORTMAN. Thank you, Mr. Chairman. Again, I appreciate having the hearing and appreciate the Chairman allowing us to go through all these issues. And to Senator King, that was terrific. I mean, I think the next book maybe you ought to write with all of your experiences you have had since you have not been able to keep a job. [Laughter.]

I love the regulatory accumulation theory. I also think that you have laid out the case very clearly for not just cosponsoring the Federal permitting bill but also getting that thing done, because you are right, as a developer you ran into this. As a Governor, you ran into it. We run into it in Ohio all the time.

One of the reasons that I got involved in this legislation—and I think I have told the Chairman this, but one of our companies in Ohio that is interested in hydropower on the Ohio River—it is called American Municipal Power—came to me and said, we are trying to do something good here in terms of energy, in terms of jobs, and we just cannot find investors because it takes too long to go through the permitting process.

So it is your point about this notion that—I think the way you put it was, "Time is money." And it is going to be tough for us to develop some of this infrastructure that everybody now is acknowledging we need to help in our infrastructure. It is hard if you have so many permits.

So here is some data I think you and I have discussed, but the World Bank does this Ease of Doing Business study, and they rank all the countries in the world, and the United States has now fallen to 34th in the world for dealing with construction permits. And so to the extent capital flows across borders now, which it does, in an increasingly competitive global economy, as you talked about, investors everywhere are looking at that, not just American investors who are thinking maybe I should invest somewhere else, often an emerging economy, or often a developing country that does a better job with this, but also those investors overseas who are thinking about whether they are going to invest here or somewhere else are not likely to look at the United States if we are number 34. That means there are 33 countries where they can get a permit faster.

So I appreciate your testimony. I thought it was very comprehensive. Former Interior Secretary and former Senator Ken Salazar, the Obama Administration Interior Secretary, recently said with regard to your Cape Wind example, "Taking 10 years to permit an offshore wind farm like Cape Wind is simply unacceptable." And so this is about all forms of energy; it is about all forms of construction; it is about all kinds of permitting.

You are right about the lead agency concept. That is in the legislation. You are also right about the no serial permitting; in other words, that is part of it, that the Federal Government would have to provide to the developer the permits at the outset so that you are not finishing one permit, then finding another one.

We had testimony from the Energy and Power Subcommittee in the House recently. There were 35 separate Federal permits required for a single project, seriatim, serial permitting.

So, look, I really appreciate your willingness to step forward and give us the benefit of your experience and advice and having you join Senators McCaskill, Donnelly, Manchin, me and others on this permitting bill is really great. And I really appreciate the Chairman's willingness to allow us to move forward with this.

I have lots of questions for you, but I do not want to put you on the spot here today, so I will ask you those questions maybe on the floor of the Senate when we talk about this further. But just thanks very much for coming.

Senator KING. Well, thank you. And I just want to emphasize—and I think it goes without saying—nobody in this body, at least nobody that I know, and certainly not me, wants to gut regulation or wants to shortcut environmental review. I mean, I have spent my whole life defending the environment. But it does not have to

be done in a clunky, inefficient, expensive, redundant, and overly burdensome way. And what we really have to separate is content from process, and we can have the standards and have the content. What we have to do is make sure the process makes sense.

And to your point, one of my careers was with a small business that was in the hydro business, and we had a partner from the country of Norway who invested substantial funds. And after about 5 years, they pulled back basically because the regulatory process in America they just found baffling and it was a crapshoot. Capital goes where it can earn a return and where there is a reasonable certainty of that return. And, we should not rely on the fact that entrepreneurs are not only entrepreneurial but are willing to take what are sometimes really not very good risks on a regulatory process that is not predictable, is not timely, and is so incredibly expensive.

So I really appreciate the work and your allowing me to appear before you. Thanks again, gentlemen.

Senator TESTER. We appreciate your contribution to the Subcommittee. Thank you, Senator King.

Senator Portman, if you would like to go with your opening statement at this point in time, we would certainly be——

OPENING STATEMENT OF SENATOR PORTMAN

Senator PORTMAN. Great. Thank you, Mr. Chairman, again, and Senator King can be excused now because he has other things to do, and if the other witnesses want to start heading to the table, that is fine, too. I am just trying to make it more efficient for everybody.

But I do appreciate your letting us move forward on these hearings on these bills. I think this is an incredibly important hearing today. We are going to look at a number of different potential regulatory reform efforts.

We all believe, as Senator King had said, that regulation is necessary, an important function of government. But it needs to be appropriately designed—I think Senator King made that point well—implemented properly. After all, it was regulation that took the lead out of our gasoline in 1973, secured United States financial markets after the Great Depression. Regulations are needed, but by its nature can be really complex. And this expanding catalogue of Federal rules has made it exceedingly difficult for us to attract investment and, frankly, to do what businesses do best, which is to help create jobs at a time when we are living through such a weak economic recovery.

Each year well over 70,000 pages of additional regulatory requirements are now published in the Federal Register. That is 70,000. And in the past two decades, the Code of Federal Regulations (CFR) has expanded by as much as 25 percent to an astounding 180,000 pages. Many of these new rules do represent significant costs to the economy, regularly in excess of $100 million each year.

Over President Obama's first 5 years in office, his Administration on average put out more than 53 of these major regulations each year, a substantial increase over what Presidents George H.W. Bush, Bill Clinton, and George W. Bush, each who had an average

of about 45. So the annual costs of Federal regulations now they are estimating at $2 trillion, and this continues to grow substantially.

So, again, I think we have made the point well already this morning that there is a way to do this smarter, and we have an opportunity here to see some examples of how to do that.

I appreciate that Senator Pryor is here and Senator Tester, because they have both been involved in this issue and both have been involved with specific legislative initiatives to try to deal with this issue. I know that we are going to talk more about these bills, but the Regulation Accountability Act, for instance, is one of them where these Senators and others have agreed to step forward and say, hey, let us do this in a smarter way, and not just require cost/benefit analysis but look at the least burdensome way to achieve an objective, have appropriate judicial review for major rules, and come up with ways to eliminate rules that do not make sense.

The public rightly expects us to do this. The principles of good government I think are already established in Executive Order (EO) 12866, and we have talked a lot about that in this Committee. It says "only upon a reasoned determination that the benefits of the intended regulation justify its costs" should a regulation be adopted and "the most cost-effective manner to achieve the regulatory" outcome. So I think in many respects, we need to just follow these principles of good governance that are already established in the Executive Order.

I look forward to the testimony from our experts here today, Mr. Chairman. I want to particularly point out that I probably would not be sitting here, which might be a good thing for me or the country, if not for Boyden Gray, because he made the grave error of hiring me in 1989. In 1989, he hired me as Associate Counsel to the President and put me in his office in the White House where he immediately had me look at regulatory reform, believe it or not. So I appreciate Boyden being here in particular and his vast experience in this area.

Thank you, Mr. Chairman.

Senator TESTER. Yes, thank you, Senator Portman, for your comments and your observations.

Senator Pryor.

Senator PRYOR. Well, thank you, Mr. Chairman. I really want to thank you for having this today, because I know that Senator Portman and I asked that you would do this sometime, and you did, and we appreciate that very much. Senator Portman has really been a great leader on this. I want to talk about him in a just a moment.

But one of the things that I have experienced in my time in the Senate is I have heard from many Arkansans and Arkansas businesses, particularly the smaller businesses that are struggling to meet the increasingly heavy regulatory burden. Each year Federal agencies issued more than 3,00 final rules, many of which do have a significant economic impact.

President Obama emphasized in Executive Order 13563, President Obama emphasized that our regulatory system should promote economic growth, innovation, competitiveness, and job creation. I agree with that. Unfortunately, I do not think our regu-

latory environment does that. I think that it is time for Congress to review the laws that really form the foundation of our regulatory system. We need to find the ways necessary to make those laws fairer and more reasonable and more effective in meeting the dual challenges of protecting the public while making our economy stronger and more competitive.

That is why I have teamed up with Senator Portman to introduce S. 1029, the Regulatory Accountability Act of 2013. We call it Portman-Pryor. He really does deserve the lion's share of the credit for working on this. It has been great to have a partner like him on this. But I do feel that, done right, the regulatory reform effort—the regulatory system can be better, cheaper, and faster.

There is a lot in this bill. Some of it is basic. Some of it is very basic, like just requiring an agency, a regulating agency, just to State their statutory authority for doing what they are about to do. That is pretty basic stuff. But we have seen this before where they may not have that authority, it goes to court, and it turns out they do not.

Some of it is much more complicated and really gets down in the weeds, but basically what the Portman-Pryor effort does not do is it does not go after one agency that may be unpopular on a certain thing, like the Environmental Protection Agency (EPA) or something, or, one agency on one specific thing. What it really does is amend the Administrative Procedures Act to really put a greater emphasis on early engagement between agencies and the parties subject to these high-impact rules that cost over $1 billion or more per year and major rules costing $100 million or more. These expensive rules are where the regulatory focus I believe should be. I mean, it is not the only focus, but I think that is where the biggest focus should be.

And we all know that sometimes it takes way too long to do the rules, it takes way too long to get to the final product. So we need to find ways and I think one of Congress' responsibilities should be to really find ways to make this work a lot better than it is working right now.

So, again, I want to thank the chair for his leadership. Chairman Tester has been great on this issue in a lot of different ways, trying to make for a more sensible, more commonsense regulatory environment here in the United States.

Thank you.

Senator TESTER. Well, thank you, Senator Pryor. I appreciate your comments, and thank you for the kudos.

We are fortunate in the second panel to have Howard Shelanski with us. Howard, welcome.

Mr. Shelanski is the Administrator of the Office of Information and Regulatory Affairs (OIRA), an executive branch agency that reviews many of our rules and regulations. This Committee held Mr. Shelanski's confirmation last year, and it is always good to see you.

We are going to swear you in. It is customary that we swear in all witnesses, so if you would stand and answer this in the affirmative, if you would like, or in the negative, if you would like, however you want to do it. Do you swear that the testimony you will give before this Subcommittee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. SHELANSKI. I do so swear.

Senator TESTER. And let the record reflect that the witness answered in the affirmative.

Mr. Shelanski, you have the floor.

TESTIMONY OF THE HON. HOWARD SHELANSKI,[1] ADMINISTRATOR, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, OFFICE OF MANAGEMENT AND BUDGET

Mr. SHELANSKI. Thank you very much. Chairman Tester, Ranking Member Portman, Senator Pryor, and Members of the Subcommittee, thank you for the invitation to appear before you today. I am pleased to have this opportunity to discuss recent developments at the Office of Information and Regulatory Affairs, and my priorities for OIRA going forward.

Since I became OIRA Administrator this past July, it has been my privilege to work with OIRA's outstanding staff, with the first-rate leadership team at the Office of Management and Budget (OMB), and with our colleagues across the Federal Government. Together we are working to promote economic growth and opportunity while simultaneously protecting the health, safety, and welfare of Americans now and into the future.

OIRA does not set the agencies' policy agendas. The office does work with agencies to ensure that the regulations through which they implement policies are efficient, well designed to achieve their objectives, and based upon the best available evidence. Through the fourth fiscal year (FY) of this Administration, the net benefits of rules reviewed by OIRA total $159 billion, and we expect the fifth fiscal year numbers to show $25 billion in additional net benefits.

Three priorities for OIRA, both now and looking ahead, are the clarity and reliability of the review process and regulatory environment, rigorous analysis of rules under review, and retrospective review, or lookback, of existing regulations.

Clarity and reliability allow people, businesses and organizations, and States and localities to plan for the future. It is, therefore, important that stakeholders have notice of the government's plans for forthcoming regulatory activity. To that end, OIRA is charged with assembling and publishing a Unified Regulatory Agenda each spring and fall, setting forth the expected regulatory actions to be undertaken by Federal agencies over the coming year. OIRA published the fall 2013 Unified Regulatory Agenda and Plan just before Thanksgiving and is on track to publish the update to the Unified Agenda this spring.

The agenda is a broad list that includes all of the regulations under development or review during the next 12 months, as well as longer-term actions that the agencies are considering. Such an inclusive listing makes the regulatory environment more transparent and participatory for all stakeholders, especially when combined with the annual plan, which focuses more narrowly on regulatory actions the agencies intend to issue in proposed or final form within the upcoming fiscal year. As OIRA Administrator, I will, therefore, continue to do all I can to ensure timely publication of the Unified Regulatory Agenda and Plan.

[1] The prepared statement of Mr. Shelanski appears in the Appendix on page 39.

Of similar importance to the clarity and certainty of the regulatory environment is that both new rules and those already under review—move through OIRA as efficiently as resource constraints and rigorous analysis permit. Reducing the frequency of extended regulatory reviews and working with agencies on rules that are already under extended review are key objectives for OIRA. Thanks to the tireless work of OIRA staff, we have significantly reduced the number of rules that were under review for more than 200 days, and the number of rules under review for more than 90 days is down considerably and continues to fall.

In addition to improving the clarity of the regulatory environment through notice and timeliness, we are updating the tools the public can use to engage in the rulemaking process. We continue to explore ways to make improvements to our information systems that will increase transparency, including making the disclosure of information associated with regulatory review more complete, automated, and user friendly.

While increasing the predictability of the regulatory process through timely review of rules and regular publication of regulatory plans and agendas is essential, Executive Orders 13563 and 13610 also make clear that flexibility and removal of unnecessary burdens are essential elements of the Federal rulemaking process. Improving existing rules, ensuring regulatory flexibility for small businesses, and reducing unnecessary regulatory burdens for everyone through the retrospective review process are high priorities for me as Administrator.

Executive Order 13610 asks agencies to report regularly on the progress of their retrospective review activities. This week, agencies are posting their most recent retrospective review updates on their Web sites. Taken together, Federal agencies provided updates on their initiatives, many of which are new efforts that agencies added since their July 2013 listing of lookback plans. These efforts are already saving more than $10 billion in regulatory costs in the near term, with more savings to come. Some additional examples that will add to these savings include:

The Department of Transportation's proposed rule to rescind the requirement that truck drivers submit and retain certain kinds of inspection reports, a change that would save approximately $1.5 billion in annual paperwork;

In the area of export control regulations, streamlined licensing processes are now finalized for 11 of 17 targeted categories of export controls, with more in the works;

And the Department of Veterans Affairs (VA) issued a proposed rule to reorganize and rewrite its compensation and pension regulations making it easier and less costly for claimants, beneficiaries, veterans' representatives, and VA personnel to locate and understand these regulations.

While there has been important progress on retrospective review, I think we need to do even better. At OIRA, we are working, along with colleagues elsewhere in OMB and at the agencies, on several ways to further institutionalize retrospective review as an essential component of government regulatory policy. As part of this effort, we are developing several features that will make regulatory lookback a more systematic priority for agencies. Such institu-

tionalization of retrospective review, both to ensure follow-through on existing plans and to help agencies develop their future plans, will be one of our key objectives moving forward.

Thank you very much, and I look forward to your questions.

Senator TESTER. Well, thank you very much for your testimony. I am going to start by going back to what Senator King talked about as some of his principles. First of all, how many employees are in your department?

Mr. SHELANSKI. Right now we are at roughly 45 full-time equivalents (FTEs).

Senator TESTER. OK, and I will get to that in a second. One of the things that Senator King talked about initially is that the regulations need to be looked at from a competitive standpoint. Are you able to do that? Is that part of your mission?

Mr. SHELANSKI. Thank you for your question, Mr. Chairman. It is part of our mission. In Executive Order 12866, in the section that talks about taking account of the costs and benefits of regulation, competitiveness is actually one of the factors that is specifically mentioned that should be taken into account in assessing the burdens or costs a regulation might impose.

Senator TESTER. So what do you do if you think regulation is anticompetitive?

Mr. SHELANSKI. Well, one of the things that we always look to do when we are reviewing a rule at OIRA is to examine all of the costs that the rule might create, as well as the benefits. And we ask agencies to come to us with their best evidence of all of the different costs that might result. And we are charged under a variety of statutes—the Regulatory Flexibility Act, the Paperwork Reduction Act—to look for areas where we might be able to encourage the agency or ask the agency to reduce such burdens.

Senator TESTER. OK. So you do that in written form? Do you send back recommendations to them?

Mr. SHELANSKI. There are a variety of ways that there is a lot of deliberative process back and forth between the staffs of agencies and OIRA.

Senator TESTER. As the review goes on?

Mr. SHELANSKI. As the review goes on.

Senator TESTER. OK. Look, we just had a hearing earlier today on congressional intent of a regulation on banks versus insurance companies. And it was pretty apparent at that hearing that the authority for regulation is nothing like what Congress had passed. Why is that? I mean, maybe you do not see it that way, but I certainly do. There are many regulations that we put up, and congressional intent does not seem to be a part of the equation once it hits the agency.

Mr. SHELANSKI. Mr. Chairman, that is a question I would have to do some more thinking about. That is a big question. We typically see rules that are well within the authority of the agencies to issue, and we——

Senator TESTER. There is no doubt about that.

Mr. SHELANSKI. Yes.

Senator TESTER. The question, though, is that when we pass a rule and the discussion that is around that rule, whether it is in Committee or on the floor, often indicates what Congress would

like to see in a regulation once it is out. Just let me ask you this: Does OIRA take that into consideration? And, by the way, you are not the end-all and the be-all, so I do not expect you to do everything I am asking you. But the fact is I am curious to know if, in fact, you are able to take a look at proposed regulations and refer them back to the intent of Congress.

Mr. SHELANSKI. We typically look at the regulations on their own terms once they are determined to be within the agency's authority.

Senator TESTER. OK. You have 45 employees, and I know that there are a lot of regulations that come out, maybe rightfully so, maybe not. How do you assess your staffing and your department?

Mr. SHELANSKI. Like, I think, the agencies that we work with on their regulations, like the rest of the Office of Management and Budget, we are all working very hard to do a lot with what I would describe generously as "streamlined resources."

Senator TESTER. Do staffing challenges make it difficult for you to do your reviews on time?

Mr. SHELANSKI. I think that if we had, like the rest of OMB, like the agencies, if we had more staff, we would be able to work more quickly. But I think we are managing to do a pretty good job reviewing most rules within the normative time of the Executive Orders.

Senator TESTER. OK. You recently talked about improving transparency as being one of your goals for this year, but you cite a number of challenges to achieving that goal of greater transparency.

First of all, why do you think transparency is important? And, No. 2, how do we make it so you can achieve it?

Mr. SHELANSKI. Thank you very much for that question, because I do think that transparency, Mr. Chairman, is actually one of the key features that really distinguishes the American regulatory process. We have a process in which people have notice of rules that are forthcoming. They get an opportunity to comment on those rules during a period when there is still the prospect of meaningful change. And agencies are held accountable by the courts in taking public input meaningfully into their process and into account in finalizing the rule. So transparency is extremely important in the process, and I think we actually have a remarkably transparent process by any comparison.

Senator TESTER. Based on what? I mean, why do you say that?

Mr. SHELANSKI. We have a process here in the United States that, when one looks around, we have stakeholders—businesses, citizens, activist groups, anybody who wants to come in has a chance under the Administrative Procedures Act, under the Executive Orders, to weigh in and get their views heard.

Senator TESTER. All right.

Mr. SHELANSKI. And the courts hold the agencies accountable.

Senator TESTER. OK. Thank you very much. Senator Portman.

Senator PORTMAN. Administrator Shelanski, I appreciate your being here. You probably have the most important job in Washington that nobody knows about. And it is not just an important job; it is a really hard job. I was there at a time when we had the opportunity to hire somebody for your role, and I talked to a lot of

people and ended up with someone who had expertise, as you do, in this and got to learn more about the skills that are required, so we appreciate your service.

As you know, I think our regulatory costs are going up, not down. It concerns me. If I look at the White House language on this, it says, "We are constantly trying to minimize regulatory burdens and avoid unjustified regulatory costs." That is something I agree with totally. And yet when I look at one of the real measures of regulatory output, what should be the costs of these economically significant rules—that is, the rules with $100 million or more impact—in the first term, which are the numbers that we have, the Obama Administration was far more aggressive than any of their predecessors.

In fact, if you look at the Administration's own estimates, the costs of those significant rules would be greater than the costs in 2012 alone, which is, I think, the last year for which we have data—that one year would be higher than the entire cost of the first term of the Clinton Administration and the first time of the George W. Bush Administration.

So I do think there is a change, and this past year is no different. In 2013, what we have is that regulators had published $112 billion in net and regulatory costs, including the deregulatory measures, and added 157.9 million paperwork burden hours. So I guess, my general question to you is: Can we do better?

Before I ask you to answer that more general one, let me just talk specifically about the lookbacks and trying to eliminate old, inefficient rules. Again, I think it is a good idea. I, again, am focused on, how do we look at the actual results of that. Of the first 90 rules changes initiated as part of the regulatory lookback, the estimated compliance cost is $3.3 billion, according to an analysis by American Action Forum Data Agency published in the Federal Register. Your testimony suggests that the more recent efforts have boosted lookback savings costs to around $10 billion. When you put that figure in context, the picture becomes a little less encouraging. According to data reported by the agencies themselves, in 2012 alone, again, the administration's new regulatory burdens imposed $236 billion in new burdens, so we are talking about a relatively small reduction in burden, whether it is 3.3 or 10 billion, compared to the new costs.

This same report I talked about says even if you look at only the first 90 rules undertaken by the agencies as part of this lookback, the new costs that are involved total $11 billion. In other words, the lookback itself, because it expands other rules, cost $11 billion, and yet the savings is either $10 billion, in your latest testimony, or $3.3 billion. In other words, the costs of regulations attributed to the lookback rules actually exceeded the cost savings.

Now, that might not be true going forward, but it does concern me. The most recent analysis I have seen examining quantified rulemaking in the retrospective reports found that the rules' increasing costs outnumber rules implementing cost savings measures by a ratio of 3.7:1.

So the first question for you here is: How can agencies be incentivized to institute meaningful regulatory reviews that will improve existing regulations and actually reduce overall regulatory

burdens? And what would you do to institutionalize that kind of a retrospective review?

Mr. SHELANSKI. Thanks very much for your question, Senator Portman. Without being able to comment on the particular numbers or the particular report that you identified, I think that the important thing to keep in mind is when a retrospective review is done, it is typically done through a rulemaking. You need to do a rulemaking to change a rule. And we look, when we examine a retrospective rule, just as we do with any other rule, to make sure that that rule, where permissible by statute, is cost justified—that is to say that the benefits justify the costs.

So we would be very concerned if we saw a rule that was supposed to be reducing regulatory burdens that, in fact, imposed regulatory burdens that exceeded the savings. And so we do in the retrospective review process, just as in the review of new regulations, look very carefully at the regulatory impact analysis and the costs and benefits.

So what we are trying to do to further institutionalize the lookback effort is to do a number of things. One thing is to ask agencies to get into the habit—I think they have been really excellent in getting into the habit of identifying retrospective review plans, posting them, and every 6 months telling us which ones have you accomplished, which new ones are you adding, which one are ongoing.

So the retrospective review reports that we receive from agencies and that we review prior to their posting them on their Web sites are, I think, a key part of institutionalizing and creating a mechanism, a routinized mechanism, if you will, within the agencies of looking for good targets for lookback.

But we have other things that I think we need to start considering, that we need to start working with the agencies on, to make sure that there is follow-through on the plans that they list and that the plans that they have identified are really the valuable plans.

The truth is lookback is very difficult, as Senator King said. It is not the easiest thing in the world to find high-cost, low-benefit rules that are just lying around on agency books. Most of the low-hanging fruit has been harvested in this regard.

So it is a substantial dedication of effort and resources by the agency, and we look forward, both at OIRA and with our colleagues on the management side of OMB, to working with the agencies on a number of mechanisms by which those resources and that focus will be increased going forward.

Senator PORTMAN. OK. Well, we will share with you these numbers, and if you could give us a response in writing, that would be terrific as to why you think the analysis is right or wrong. And, again, the analysis that we have would indicate that in the lookbacks there have been higher costs imposed than actual savings, which, of course, is not your intent, as you say.

With regard to institutionalizing it, it is good for me to hear that you think the agency attitude is to look—talking about agency attitude, just one other question. Do you think that agencies face a sort of inherent conflict of interest in looking at their own rules in terms of the costs and benefits? And is there a role here for OIRA,

or for the Government Accountability Office (GAO) or maybe an independent congressional regulatory review office, to be tasked with evaluating the actual costs and benefits of regulations after they have been implemented?

Mr. SHELANSKI. In my time as Administrator, so since July, I have not encountered a situation in which an agency has seemed hampered by a conflict of interest in reviewing one of its own rules. The agencies, insofar as I have dealt with them on retrospective review, have been quite interested in doing good policy and trying to improve their regulatory systems.

Senator PORTMAN. Thank you, Administrator.

Thank you Chairman.

Senator TESTER. I have a couple quick questions here. Executive Order 12866—hopefully that rings a bell—directs disclosure of all substantive comments and changes, which includes the informal review process. Are those publicly disclosed?

Mr. SHELANSKI. Just to clarify, Mr. Chairman, of course the comments that are submitted during the public comment period that a rule has been put out for comment by an agency are disclosed and are docketed. We have meetings under Executive Order 12866. We do not ask for the meetings, but any party that wishes to weigh in on a rule under review at OIRA is entitled to have a meeting with me or somebody who I designated.

Senator TESTER. OK. And those——

Mr. SHELANSKI. We docket those meetings and any materials provided.

Senator TESTER. OK. So it is for public examination.

Mr. SHELANSKI. Yes. Very often there are no materials provided, but the fact of the meeting, who attended, and anything that they provided in terms of materials is docketed and available to the public.

Senator TESTER. OK. There have been 38 rules that have been posted on the OIRA Web site for public comment for longer than 6 months. What is the main impediment to getting these reviews out?

Mr. SHELANSKI. There can be a variety of reasons that a rule goes beyond the 90 or—there are permissible extensions, but the normative times established in the Executive Orders. Very often a rule is very complicated, it is extremely long and detailed, and the normative time of 90 days in the Executive Orders does not necessarily fit for all rules. And very often what happens during the review procedure, just speaking generally, is OIRA staff will raise very serious questions, or through the interagency review process, an agency that may have an interest in what another agency is doing might need quite a bit of time to fully understand what the implications of that rule will be for its regulatory program. And there can be a lot of discussion amongst the agencies. And at the end of this process, the agency that wishes to promulgate the rule may want to do more research, may need to do additional studies, may go partially back to the drawing board. And during that period, the rule is back with the agency, and it could be for a very good reason. It could be to improve the rule, to solidify the underlying evidence.

So one of the reasons for an extended review period can simply be that new information came to light during the review process that required a bunch more effort.

Senator TESTER. OK. I would just like to get your opinion. You review rules all the time, and the one-stop shop suggestion where you have a lead agency on regulations, do you have an opinion on that?

Mr. SHELANSKI. So I do not have an opinion to offer here today. I would note that I did listen with great interest to Senator King's discussion of permitting and the idea of a one-stop shop for permitting. And I know that the Administration is absolutely committed to ensuring that we do have 21st Century—not the nostalgic infrastructure but 21st Century infrastructure, and that the permitting that will allow for that infrastructure to develop can occur efficiently in a modern way that is consistent with protecting our communities and protecting our safety. And the President through a Presidential memorandum did charge the Council for Environmental Quality (CEQ) and the Office of Management and Budget with leading a task force that would help to come up with suggestions and proposals for that streamlining. And the Office of Performance and Personnel Management at OMB is working with CEQ on that effort, and I would be very happy to take that question back to them.

Senator TESTER. That would be fine. Do you know if there is a timeline for recommendations from that?

Mr. SHELANSKI. I believe there is, sir, but I do not know exactly what it is off the top of my head.

Senator TESTER. Well, I appreciate that.

Senator Portman, further questions?

Senator PORTMAN. Yes, just, I guess, following up on that. In March 2012, there was an Executive Order issued as to permitting specifically, and I do not know if that is the memorandum you referred to earlier. It sounds like that might be different. This is an Executive Order. And it said it was aimed at improving performance of Federal permitting and review of infrastructure projects. It is aimed at more efficient and effective review projects, faster decisionmaking, transparency, predictability, accountability for infrastructure permitting.

The White House has said that since that Executive Order, agencies have expedited the review of a number of major projects, 22 of which have completed the Federal permitting process. There was a dashboard Web site containing a searchable database of information for certain projects selected as part of the initiative, so it is almost like a pilot program, it sounds like to me, on dashboards.

And you might have heard Senator King talking about the Federal Permitting Improvement Act that he is now a cosponsor of, and it creates, as you probably know, a permitting dashboard that is similar to this White House initiative, and it would be available for larger projects, would provide information on the status of the permits, status of approvals, the NEPA reviews, basically providing more transparency and accountability in permitting.

As OIRA Administrator, do you support this concept of a permitting dashboard called for in the Federal Permitting Improvement Act to encourage that transparency and accountability?

Mr. SHELANSKI. Senator Portman, I am not in a position today to articulate an administration position on the bill, but, of course, I would be very interested in the discussions that would have to happen both within the Administration and between the Administration and Congress in formulating such a position.

I will say that I do fully support as OIRA Administrator, of course, the Administration's objectives that you mentioned that are articulated in the Executive Order and, to the extent that those have a regulatory component, look forward to working in a complementary way with any of these permitting initiatives.

Senator PORTMAN. OK. You better say nice things about the Federal permitting bill because Senator McCaskill has just arrived.

Mr. SHELANSKI. Just in time.

Senator PORTMAN. You do not have to be nice to me, but you better be nice to her.

OK. Let me ask you one quick one on independent regulatory agencies, and I will try again not to put you on the spot, because I do think that dashboard that we are talking about for all projects is consistent with the dashboard that you have in your own Executive Order. But on the independent agency review issue, as you know, Senators Warner and Collins and I introduce this thing that basically takes the President's language, as I see it, and codifies it to make sure independent agencies are subject to cost/benefit analysis requirements, other burden-reducing principles that have long governed the executive branch agencies that you review. It would require submission to OIRA for a non-binding evaluation of the agency's analysis in the public record. And prior to becoming OIRA Administrator, you helped lead one of those independent agencies, and, therefore, I think you are qualified to speak on this issue.

Out of the 21 major rules issued by independent agencies in 2012, not one was based on a complete cost/benefit analysis. Now, that is based on OIRA and GAO annual reports. There are also some other literature on this that I am happy to share with you, but that is our sense of it, that it just does not happen. The same basically was true in, by the way, 2009, 2010, and 2011. So we are not seeing the kind of independent agency review the President called for in his Executive Order.

Again, having been someone who led an independent agency that was regulatory, do you believe it would be of value to require sound review rulemaking principles through independent regulatory bodies and to provide third-party review of the rules they promulgate?

Mr. SHELANSKI. Thank you, Senator Portman. Maybe because I did work at two independent agencies, I particularly value the independence of those agencies, and I think that in my experience, the agencies do a conscientious and careful job with their rulemakings. I do think that the Executive Order helps in that regard in letting the independent agencies know sort of what additional principles they might want to bring to their rulemaking.

So I think the way the current system works, the tools that the independent agencies have and the tools that we have at OIRA where we are available to consult upon request or to discuss rulemakings with those agencies if they have questions about implementing the Executive Order work quite well.

I have not had the chance to discuss within the Administration any official administration position on the bill, so I am certainly not in a position to comment in that regard now. But my own experience is that the independent agencies are—while all agencies can do better, they are doing a conscientious job with their rulemakings.

Senator PORTMAN. So you would disagree that out of the 21 major rules, say in 2012, that none were subject to a complete cost/benefit analysis? You think it is just fine what they are doing?

Mr. SHELANSKI. No, I do not disagree with the OIRA report, but I do think that the independent agencies are subject to all of the APA requirements, they are subject to judicial review; and I just am not in a position to say right now whether any particular piece of legislation would improve the situation.

Senator PORTMAN. We would differ on judicial review, unless you are talking about specific statutes that have judicial review within them. But my time has expired, so we will come back maybe with some questions in writing on that as well.

Thank you.

Senator TESTER. Senator McCaskill.

Senator MCCASKILL. I know my colleagues and my cosponsor have covered most of this, and I do not want to belabor it by going back through some of the points that I would like to emphasize. But I would ask you this question: Do you think that one of the problems we have in this regard, in government there are people like you who are giving your time and your service, and you are kind of way up here. And then there are entry-level people, and then there is what I call the calcified middle. And the calcified middle in most instances are the ones that are driving the rules and regs.

Do you think that the lack of private sector experience in that calcified middle has an impact on some of the nonsensical outcomes we have on some of these rules in terms of delays and failure to do adequate cost/benefit analysis?

Mr. SHELANSKI. My experience with the people who write the rules at the agencies is that they are very attentive and very thoughtful about what they are doing. I have not seen a major rule come to OIRA in my time there where the heart of the agencies that have been involved with writing the rule have not engaged in fairly significant interaction with stakeholders and actually taken that stakeholder interaction quite seriously.

There are times that their analysis can be improved, and that is one of the things that my office tries to work with the agencies to do, and so I think we provide a valuable function in terms of providing some additional perspective.

But I have not noticed, at least on the major rules that I have had the opportunity to participate in reviewing in the last 8 months, the kinds of hazards or problems to which you are alluding.

Senator MCCASKILL. Well, it is hard to imagine that we could make it any more complicated or difficult than it is right now with some of these rules. So hopefully we can get some of at least our permitting stuff that we know costs real money, that we can maybe

get some action on that legislation that would make things go quicker and make accountability more clear.

So thank you very much for being here today.

Mr. SHELANSKI. Thank you, Senator.

Senator TESTER. Thank you, Mr. Shelanski, for your testimony and your availability for questions. We will release you now and bring on the third panel. Thank you very much and good luck.

Mr. SHELANSKI. Thank you, Mr. Chairman.

Senator TESTER. Now on our third panel we have three witnesses to round things out, and you folks can come up and sit down as I introduce you.

We have Michelle Sager, who is the Director of Strategic Issues at the U.S. Government Accountability Office. In this role she oversees GAO's analysis of the regulatory process. I want to thank you for being here, Michelle.

We have Katherine McFate, the president and CEO of the Center for Effective Government and who co-chairs the Coalition for Sensible Safeguards. The Center for Effective Government is a nonpartisan organization that advocates for transparency in government. We appreciate you being here, Katherine.

And last, but certainly not least, who Senator Portman brought up, Boyden Gray, who is the former Ambassador to the European Union and the White House Counsel to President George H.W. Bush, who appointed him as Counsel to the President's Task Force on Regulatory Relief. It is great to have you here today, Boyden, and I appreciate you taking the time.

As with the previous panel, I would just like you to please stand and answer in the affirmative or the negative as I swear you in. Do you swear that the testimony you will give before this Subcommittee will be the truth, the whole truth, and nothing but the truth, so help you, God?

Mr. GRAY. I do.

Ms. MCFATE. I do.

Ms. SAGER. I do.

Senator TESTER. Let the record reflect that the witnesses answered in the affirmative. I am going to start out with you, Mr. Gray, and then we will just go down the panel, I should say, but once again, welcome, Boyden, and go ahead.

TESTIMONY OF THE HON. C. BOYDEN GRAY,[1] FOUNDING PARTNER, BOYDEN GRAY & ASSOCIATES, PLLC

Mr. GRAY. Thank you very much, Mr. Chairman, and Senators McCaskill and Portman.

Senator Portman was the best hire I ever made, so I wish he was still in closer proximity. But the sky is the limit, perhaps.

This is a great opportunity for me to make just a couple or three points. I believe that overregulation, unnecessary regulation, is a major wet blanket on growth, opportunity, innovation, and employment, and so this is to me a very big deal.

I want to talk about the Regulatory Accountability Act a little bit, the permitting proposal that Senator Portman has put up, and

[1] The prepared statement of Mr. Gray appears in the Appendix on page 42.

Senator King joined, and also just a comment about legislative reform.

On Regulatory Accountability, it codifies the cost/benefit requirements that have been in place as a matter of Executive Order for many years, since 1981 at least, subjects them to judicial review. This is, I think, better than what you get under the Executive Order, which is not reviewable. It also would apply this to independent agencies. I do not think there is a single academic in the country who would really argue today that independent agencies should not be covered in the same way the other agencies are. The fact that they are not, for example, gives Europeans heartburn because it has so deep an impact on financial services where there are so many divergent issues that are facing Europe and the United States.

On the permitting proposal, this addresses one of the most insidious brakes on economic growth, in large part because it involves so many hidden delays and so many hidden burdens and hurdles. And the one-stop shop idea, putting OMB in at the heart of leadership, I think would be very important.

I want to make a parenthetical comment that 45 people is not enough in that office. I think when we started out doing this in 1981, I think there were double the number. And, of course, the workload of that office has increased since then. But if you are going to add independent agencies to the review process, I think you have to also give OMB the resources.

I think the permitting thing, if you look at one report in my testimony for the new gas shale that there is a new opportunity, which is much under discussion today because of what is happening in Ukraine, there are 1,400 miles of pipeline that must be built yearly just to move this gas around the country to where it is needed, to say nothing of moving it to a place where it might be exported. EEI says it is going to be spending $50 billion over the next 10 or 15 years on transmission lines. None of this will take place without permitting, and if the permitting is not expedited, none of it will take place period.

So I am very much in favor of this legislation. It puts a time limit, as Senator King noted, on judicial review. It gives 6 months to decide, not 6 years, and I think that is completely reasonable.

If you look at what EPA is proposing for so-called PSD, prevention of significant deterioration, it seems like it is pretty obscure, but it would allow them to regulate every building construction project practically in the country over time. And I think that is just really overkill.

My one substantive comment about legislative review is that there is a lot of stovepiping in the Congress, as there is, of course, in the executive branch. Agencies and committees, committees like this one, do not have the proper scope to make the changes that need to be made or the oversight that needs to be conducted. And so what I would recommend, in addition to what you are already proposing, is a joint committee of some sort that could take a broader view of what is going on across the Senate, across the House, and take into account all the things that are going on, the interconnections, the disconnects, and that I think would make it

easier to perform the oversight function that you are really doing a great job as it is now.

So thank you very much for the opportunity to appear.

Senator TESTER. Well, thank you very much for being here, Mr. Gray. We certainly appreciate your testimony. Katherine McFate.

TESTIMONY OF KATHERINE MCFATE,[1] PRESIDENT, CENTER FOR EFFECTIVE GOVERNMENT

Ms. MCFATE. Thank you, Chairman Tester, Ranking Member Portman. I think I am the outlier on this panel. As the co-chair of the Coalition for Sensible Safeguards (CSS), we are a collaboration of 150 groups of consumers, small businesses, scientists, environmentalists, health and safety advocates, and we are committed to defending and improving our regulatory system.

Our system of public protections has made America a better, safer place. Workplace fatalities are a fraction of what they used to be. Our air is less polluted. Our rivers are cleaner. Our food, drugs, toys, and cars are all infinitely safer than they were 30 years ago.

Our system of public protections has given us the highest standard of living in the world. They have encouraged our businesses to innovate and to improve, and they have produced broadly shared prosperity.

But our infrastructure, both public and private, as we have mentioned here, is aging. Resources for enforcement are declining. Resources for inspections are declining. And our standards and safeguards are not keeping up with the fast of scientific knowledge, because our rulemaking system has become increasingly slow and opaque. The regulatory process has been burdened by unnecessary delays, process burdens, analytic requirements, and new legal challenges, all of which make it harder for us to translate new scientific knowledge and evidence into effective public action.

And while we wait, children and elderly people develop preventable cancers, toddlers get run over in driveways, workers are debilitated by respiratory diseases, and the planet warms.

My testimony will only focus on one step in the current Federal regulatory process: the review of proposed rules by OIRA.

We need to recognize that Federal agencies now take on average 4 to 8 years to complete a rule. These rules are based on comprehensive scientific reviews of the literature by experts and testimony and materials collected from a variety of stakeholders, including regulated industries. But centralized review by OIRA actually delays the completion of these rules by demanding duplicative cost/benefit analyses and by exerting behind-the-scenes pressure on agency personnel to change the rules, almost always in ways that weaken public health and safety protections.

Current policy established a 90-day deadline for OIRA to review new rules and requires it to be transparent about the changes that it asks agencies to make, but the deadlines are often missed, and transparency is circumvented by informal review that can start at the very beginning of the rulemaking process.

[1] The prepared statement of Ms. McFate appears in the Appendix on page 94.

So what do we recommend? Once a rule has been formally submitted to OIRA for review, a failure to meet the 90-day deadline should be considered default approval, and the rule should be published. The scope of agency actions that require OIRA review should be limited. Congress should stipulate that OIRA may not review agency guidance documents, pre-rulemaking actions, or rules that are not economically significant. This would reduce its caseload and its workload.

Agencies should not be forced to engage in resource-intensive exercises about paring back outdated rules. They need to be scanning for emerging threats and risks. We have increasing numbers of chemicals, new chemicals that are being used in industrial processes, new drugs, new medical technologies, emerging nanotechnology, more imports in this country than we have ever had before. We need our public protective agencies to be looking outward and identifying emerging risks, not looking backward.

On transparency, we think OIRA should be required to provide copies of pre-and post-review versions of the rule in the rulemaking document. They need to provide a description of all the substantive changes made to a rule during both the informal as well as the formal review process in clear and simple language. We need to know what changes are being made by entities inside the Executive Office of the President, an agency not responsible for the rule, and by individuals who are not employed by the executive branch agency, because we do see industry influence coming into play at the very end of the rulemaking process.

Finally, we would like to see OIRA be required to provide a summary of the subject matter that is discussed at meetings with outside groups. In response to Senator Tester's question, they do not post summaries of what is being discussed at the meeting. They say who is in it, and then they post the material, but not what is being discussed. The public has a right to know why important public protections are being delayed and oftentimes weakened and who is in on those decisions.

Thank you.

Senator TESTER. Thank you very much for your testimony. Michelle Sager.

TESTIMONY OF MICHELLE SAGER,[1] DIRECTOR, STRATEGIC ISSUES, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Ms. SAGER. Chairman Tester, Ranking Member Portman, and Senator McCaskill, thank you for inviting me to be with you today to talk about some of GAO's prior work, our findings, as well as updates on our recommendations. I am pleased to have the opportunity to discuss these important Federal rulemaking process issues.

One common theme that has repeatedly emerged in our body of work is the importance of transparency in the rulemaking process. Drawing on that body of work, my remarks today will focus on three key topics: first, agencies' retrospective reviews of their rules; second, the transparency of the regulatory review process; and then, third, a brief mention of some additional challenges and op-

[1] The prepared statement of Ms. Sager appears in the Appendix on page 104.

portunities for increasing public participation as well as knowledge of the rulemaking process to outside parties.

So, first, with regard to retrospective regulatory reviews, in 2007 we found that agencies were actually conducting many more of these reviews than was readily apparent to the public. We also found that reporting on the outcomes of these reviews was often lacking. Agencies reported that most of their retrospective reviews were actually conducted so that they could get a better sense of the effectiveness of their existing regulations. Agencies also told us that their retrospective reviews, their discretionary reviews more often resulted in changes than their mandatory reviews, which most often resulted in no changes.

We made seven recommendations to OMB in that report in 2007, and OMB acted upon those recommendations. In addition, the Administration addressed our recommendations through additional guidance to agencies, asking them to plan for and conduct retrospective analyses as well as to establish plans for how they would conduct these analyses.

We are currently completing additional work at the request of Senators Johnson and Warner, and this forthcoming report will look at more recent updates on the retrospective review process, factors that either facilitate or impede these analyses, as well as the extent to which agencies are making a connection between their retrospective regulatory reviews and their agency priority goals.

I would now like to shift topics and move from retrospective reviews to the transparency of the regulatory review process.

In a series of products between 1996 and 2009, we consistently found that OIRA's reviews of agencies' draft rules often did result in changes, but the transparency and documentation of those changes resulting from the review could definitely be improved.

To date, OIRA has implemented only one of these recommendations, the recommendation that we heard about previously, to post information about the meetings with outside parties. We continue to believe that our past recommendations still have merit and that, if implemented, they would improve the effectiveness and the transparency of the rulemaking process.

Third, I would like to briefly mention two additional recent GAO reports that identify progress made in facilitating transparency and public participation as well as additional opportunities for improvement. These reports are summarized in greater detail in my written statement that will be entered for the record, but in brief, the first of these reports in 2012 found that agencies frequently cited what is known as the good cause exception in publishing final rules without Notices of Proposed Rulemaking. And, in addition, in 2013 for the first time we reviewed agencies' international regulatory cooperation efforts. Both of these reports also contained additional recommendations to OMB.

In conclusion, as you all know, agencies issue thousands of rules every year that affect numerous aspects of all of our lives as citizens as well as consumers. The rulemaking process must balance the public's right to be informed and involved with the agencies and OMB's need to efficiently and effectively implement their mis-

sions. The recommendations that I discussed in my statement today intend to facilitate this balancing act.

Mr. Chairman, this concludes my prepared statement. Again, I thank you for the opportunity to appear before you today, and I look forward to any questions you and other members may have.

Senator TESTER. Thank you for your testimony, Ms. Sager, and thank you, everybody, for your individual testimony.

I am going to turn to Senator Portman at this point in time, and he can rock and fire.

Senator PORTMAN. Great. Thank you, Chairman. I appreciate it. And, Ms. Sager and Ms. McFate and Ambassador Gray, I appreciate your testimony and the time you have put into this. We had a great discussion earlier about the Permitting Act, the Independent Agencies Act, Regulatory Relief Act, which is—the Regulatory Accountability Act, and I just have a general question, if I could, for you, Boyden, and that has to do with the comment you made in your testimony about procedural reform versus substantive reforms. And you said in your testimony, and I appreciate this, that you do support the regulatory relief efforts, and you have been part of helping us put together things that make sense here for looking at regulations prospectively. But you also make the point that while procedural reforms are critical to cleaning up the regulatory process, you say equally important are substantive reforms to underlying agency statutes to rein in delegated regulatory authority and limit burdensome overreach.

You talk about the 1987 act where Congress repealed the power plant and fuel uses prohibition against power companies using natural gas, which is very timely in my State of Ohio. There are few folks in Youngstown, Ohio, who are happy that Congress took that action, and across eastern Ohio.

But what are some other examples of regulations today that you think should be addressed through a substantive congressional action to preserve jobs and grow the economy?

Mr. GRAY. Well, the reason I mentioned the much feared, maybe little known PSD permitting program is because that is something that stems from the underlying Clean Air Act statute itself. And the Supreme Court heard argument last week—it may throw it out—but the Clean Air Act is one example of where it has been around for a long time and has not been actually revised since 1990. It is hard for the Environment and Public Works Committee to open it up. That is why I suggested a joint committee for statutory review.

But the Clean Air Act is one place where I would certainly start, and I could get into a discussion of that which would take the rest of the afternoon, and so I will stop with just the Clean Air Act. But that one provision for dealing with the permitting is absolutely ripe for congressional revisiting.

Senator PORTMAN. On the permitting side, Senator McCaskill helped put this together, and she is going to join us here again in a second, but you talked about the fact that Senator King's testimony that the current approach the government is taking is holding back our economy, stifling job growth, I think that is clearly true when you look at where the United States has fallen, again, relative to other countries. And it is a global economy, and just the

fact that it is tough to find investors for some of these projects, there is so much uncertainty, and sometimes certainty, as to the length of time.

You said that there are myriad other examples in addition to Cape Wind that do not earn such equivalent public notice. I mentioned this American Municipal Power (AMP) hydro plant on the Ohio River earlier, but I could also mention a gas processing facility in Harrison County. It was delayed because of an archaeological find that was over a mile away. And it caused a significant increase in the cost because they had to push it into the winter months, and so on, a country road that more than doubled in cost because a Federal Highway Administration (FHWA) permitting process resulted in 6 months of delays; a wind turbine project in Logan County, they ended up canceling that because of the delays.

So this is just in my State, but do you have other examples of that? And what do you think it will take Congress to sort of get notice of this? And how do we educate people as to what the permitting process is resulting in, in terms of jobs? Boyden, you are still up.

Mr. GRAY. So your question is: What does the permitting do?

Senator PORTMAN. Yes, other examples of that and how do we better educate people as to what permitting delays and costs result in terms of jobs.

Mr. GRAY. Well, my answer is sort of like Senator King's response, that the real harm is what you do not know, which is the projects that never got off the ground, the projects that you referred to, you cannot get an investor. That is impossible to measure. That is why permitting is so insidious.

I remember the detail that the Southern Company executive gave, talking about one of the biggest power plants they have, which I do not think is in Ohio but it is in the Midwest somewhere, not in the South. They were able to get it permitted in 6 months. They cannot get anything permitted in 6 years today. And that would be for trying to get a wind project going or a solar project going, something that would be extremely clean in terms of the environment, or a natural gas project, which is much cleaner than coal.

So even things that are supposed to be cleaner get caught up in this permitting, and that does not make any sense. But to put a money value on it is impossible, and the metric that I think is the most important is the one you used. You see these international rankings where the United States has fallen back to 34th, used in one survey. That is terrifying, really. This country should be No. 1 or No. 2. And there is no way to put a dollar value that I know of on projects that do not even get started.

Senator PORTMAN. Yes. Well, thank you.

Thank you, Chairman. I have to run to my next one I am late for, but I appreciate all the testimony and will look forward to having some written questions to you all, if that is OK, and getting some responses. Thank you.

Senator TESTER. Thank you, Senator Portman.

Once again I appreciate the testimony by each and every one of you today. I am going to start with you, Katherine. You are an advocate for maintaining the 90-day review mandate. In fact, you

said in your testimony that if they did not meet it, it would be a default approval.

Ambassador Gray talked about the fact that they had 90 people working in OIRA in 1981 and its down to 45 now. What is your feeling about their staffing? Do you think it is adequate? Do you think they need more folks?

Ms. MCFATE. I think it is not adequate for what they are trying to do, and they need to stop trying to do so much. If you took just that—if they only looked at economically significant rules and we actually took that $100 million mark in 1978 and did it as a percentage of the economy today, it would be rules that had a cost of more than $660 million in an economy the size of ours today.

So I think that there are things that they are trying to do that they should stop trying to do, and if they did, then they would be able to meet their deadlines better.

Senator TESTER. OK. Ambassador Gray, whenever you talk about changing environmental and judicial review, that always brings up all sorts of folks that are concerned about it, and depending on where it is done, my concerns, too. You have been around the horn a few times. Do you see this-—if we were to change environmental and judicial review, could it lead to more litigation? Or do you see it differently?

Mr. GRAY. Well, it might lead to more litigation, but remember, we have been through this big debate just recently about the workload of the D.C. Circuit, which before the addition of the last three judges had the lowest caseload by far of any circuit court in the country. So I do not think increasing the workload of that court, when you have added three judges to the lowest workload court already, I do not think that is a burden that is going to be insuperable.

Senator TESTER. OK, good. Ms. Sager, your last report on regulatory lookback was released in 2007. It appears that the Administration has attempted to incorporate many of your recommendations such as increased public engagement in its current lookback program.

Today you testified that, if effectively implements, these changes will improve transparency, credibility, and effectiveness of the retrospective analysis. What challenges to implementation do you foresee?

Ms. SAGER. Again, I should mention, as I noted in my statement, we will have additional work on this topic coming out within the next month or so, which will illuminate some of these issues. However, based on publicly available information, certainly we expect some of the same issues that we found in 2007 to remain true today, in part due to some of the challenges that we have already discussed, which are fewer resources to conduct the reviews and sometimes overlapping or duplicative requirements for multiple types of reviews.

Having said that, agencies are conducting more retrospective reviews than is readily apparent often to the general public. One of the challenges of conducting those reviews is knowing what the actual results of those reviews are and what perhaps the cost savings might be. This is in part because agencies have different metrics that they are using as they come up with costs. They may have dif-

ferent assumptions. They may have different time periods that they are using in their retrospective reviews. So one common question we get is: Can we aggregate this information and come up with a total cost savings? And that is difficult to do at best and difficult to defend methodologically.

Senator TESTER. And did you just say there is going to be a report coming out from GAO?

Ms. SAGER. Yes, we are doing a report at the request of Senators Johnson and Warner.

Senator TESTER. And it will be out when?

Ms. SAGER. It should be out in the next month or so.

Senator TESTER. And will it have additional recommendations in it?

Ms. SAGER. It most likely will. We are still finalizing our review process.

Senator TESTER. OK. You pointed out in your testimony that OIRA has only implemented one of the 12 GAO recommendations on how OIRA can increase its transparency. Has the Administration made any additional progress on transparency?

Ms. SAGER. They have implemented that recommendation. As I mentioned, we have additional recommendations in our more——

Senator TESTER. So it is just that one recommendation, that is it?

Ms. SAGER. That is the only one that they have implemented, and we do update those—we do followup on those recommendations every year, if not——

Senator TESTER. OK. So what do you see as the biggest obstacle to transparency?

Ms. SAGER. One of the challenges is they are legally complying with what they are supposed to do, but certainly the public could be better informed, stakeholders could be better informed if they did things such as made clear when a rule is changed during the review process, what is the substantive nature of that change. Sometimes it may not be a substantive change. It may just be a typographical error or some minor change. But for interested parties to sort through the rule that is submitted and then the final rule and determine what the nature of that change is, a simple identification of what the nature of the substantive change is could go a long way toward making that more transparent.

Senator TESTER. So I had asked the question to Mr. Shelanski earlier, and Ms. McFate talked about it a little bit, and that was discussions ahead of the process, they would issue a summary but they did not issue what was discussed, what was actually talked about. Is there a problem with that from your perspective?

Ms. SAGER. That is not something we have specifically looked at. In our prior report, we did recommend that they just simply make public who they are meeting with and what the nature of that meeting is, and that is something that they have taken action on.

Senator TESTER. It appears to me it might be beneficial to hear but to be able to read what they discussed.

Ms. SAGER. To understand the substance of the meeting.

Senator TESTER. OK. Well, I want to thank you all once again for being here and taking time out of your busy schedule and discussing a very important topic, not only to Senator Portman, Sen-

ator Pryor, Senator McCaskill and myself, but a lot of others in the Senate. So I just thank you for your time.

Let me see here, make sure I get the homework done here. The hearing record will remain open for 15 days for any additional comments or questions. Thank you again to our witnesses.

This meeting is adjourned.

[Whereupon, at 4:12 p.m., the Subcommittee was adjourned.]

APPENDIX

Statement by Angus S. King, Jr., U.S. Senator
Before the U.S. Senate Committee on Homeland Security and Government Affairs
Subcommittee on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce
March 11, 2014
2:30 PM

Chairman Tester, Ranking Member Portman, and members of the subcommittee, thank you for the invitation to testify today on the topic of improving regulatory processes.

Let me state very clearly from the beginning that I am not anti-regulation. Regulation is an essential function of our government and is critical to protecting the things our society values, like the environment, public health, and safety. However, I am opposed to senseless regulation – those rules that do not serve a greater public purpose and are burdensome or impede our ability to compete with the rest of the world.

In my testimony today I would like to accomplish three goals: 1) Give you a brief sense of my professional background on these issues and the various roles I have held that have informed my approach to regulatory reform; 2) Outline a few broad principles that govern my thinking about the role of regulation in society; and 3) Discuss two specific challenges we face in this space and point to potential legislative remedies.

Background

As I am offering my personal views on the state of regulation in the United States, let me first provide you all with a brief synopsis of my professional background, which has deeply informed my current thinking.

I was trained as an attorney, and after law school I moved to rural Maine to provide legal services to low-income people. In the early 1970s, I spent an interval in Washington, DC as chief counsel to the U.S. Senate Subcommittee on Alcohol and Narcotics in the office of former Maine Senator William Hathaway. In 1975, I returned to Maine to practice law in Brunswick. During the mid-70s, I served as the lobbyist for the Natural Resources Council of Maine and the Audubon Society at the Maine Legislature. In the early 1980s, I became in-house counsel for an energy development company that built small hydroelectric and biomass plants. A few years later, I founded Northeast Energy Management, Inc., which developed large-scale energy conservation initiatives at commercial and industrial facilities in Maine.

In 1994, I was elected Maine's 71st Governor. During my two terms in Augusta, I focused on economic development, job creation, and reforms in education, mental health services, land conservation, and environmental protection.

In the ten years that followed my time in public office, I was involved in a number of different pursuits, including serving on the board of a small community bank and teaching a course on leadership at Bowdoin and Bates Colleges.

I recount this background not to recite my credentials but instead to give you a sense of the many angles from which I have viewed the regulatory process. These different perspectives have necessarily shaped my thinking on these topics and have placed me somewhat outside the mainstream in considering potential solutions to our current challenges.

Regulatory Principles

The accumulation of these professional experiences has led me to develop several guiding principles that I like to discuss when I am asked about my philosophy on improving regulation. What follows are a few of these principles.

First, we live in a competitive world, and we are in constant competition with companies and people who want our jobs. Many of these companies are located in places that may not share our same tradition of environmental protection, which can make this competition structurally unequal. I raise this point because we must remember that while we need to be vigilant to protect public interests through regulation, we should not make the mistake of believing we are regulating in a vacuum. Since 2000, we have lost 32% of our manufacturing jobs; over that same time period, over 42,000 factories closed. There are numerous reasons for this decline, but our domestic regulatory policy is one of the many factors that impact our global competitiveness. We ignore this link at our own peril.

Second, regulations have a cost – and not all regulations are created equal. As I mentioned earlier, after my time as governor, I served on the board of a small community bank in Maine. During that time, I saw the first-hand effects of the new Dodd-Frank regulation of the mortgage business – and frankly, the impact on these small banks has been devastating. The Bangor Savings Bank did not cause the financial crisis; why are we regulating it as though it did? To avoid situations like this, regulations must be carefully calibrated and scale-appropriate. I know that the OMB's Office of Information and Regulatory Affairs (OIRA) is trying to do this in its review of economically significant regulations – and I am glad to know that Administrator Shelanski is here today to talk about the work his folks are doing to make sure that these regulations are properly vetted.

To this point, numerous studies have been conducted to compare the cost per life saved of various federal regulations. For example, the unvented space heater ban, created in 1980, has an estimated cost of $100,000 per life saved.[1] Is a life worth $100,000? I think most people would agree that it is. As you move further down the list, the calculations shift considerably. Take

[1] "Measures of Mortality Risks," by W. Kip Viscusi, Jahn K. Hakes, and Alan Carlin, *Journal of Risk and Uncertainty* Volume 14 (1997).

OSHA's occupational exposure limit for asbestos – this costs $9.9 million per life saved. And drinking water standards for atrazine and alachlor? This rule clocks in at $109 billion per life saved. Why do I raise this issue? Because lives are valuable, but in a world of limited resources, $109 billion per life saved is a significant sum of money. Given these real impacts, we must ask ourselves about the broader opportunity costs we incur by not determining if there are more efficient ways to achieve similar public policy goals.

Third, time is money. Two of the biggest problems with regulations as they stand today are the length of time that the administrative process takes and the overlapping jurisdictions of agencies regulating the same thing. Perhaps one of the best-documented examples of this issue can be found in the experience of Cape Wind's offshore wind turbine project. Regardless of your feelings about offshore wind, we should all be able to agree that it should not take twelve years and $65 million to complete the permitting process. Any rational developer would look at Cape Wind's experience and not even bother making the investment. Again, it does not matter if you are pro-business or if you dislike renewable energy – the costs our country incurs in not having a more streamlined process for major projects are substantial. I will devote a later portion of my testimony to speak about this in more detail.

Fourth, attitude is everything. Let me give you an example from Maine. In 1997, during my first term as governor, the leadership of National Semiconductor approached me and said they were thinking of locating a new, $1.2 billion state-of-the-art semiconductor manufacturing facility in Maine. Through a coordinated and motivated effort, we were able to permit the site for construction in 29 days. How? We took an active attitude of finding solutions rather than looking for problems. There's no legislative remedy for the challenge of institutional inertia; instead, it is incumbent upon administrators to inculcate an attitude of "getting things done" through ongoing, active, and deliberate management.

Finally, abuse of the administrative process is an inappropriate regulatory technique. This particular issue is a point of departure for me relative to some of my friends in the environmental community. There are many people – often in the name of environmental protection – who utilize the regulatory process as a weapon, creating a war of attrition. This kind of abuse is what gives regulation a bad name and makes it more difficult for other consumer and environmental protection groups, who wish to draw attention to legitimate health and safety concerns, to gain traction with the respect to the business community.

It bears mentioning that tough standards and a timely process need not be at odds with one another. When I was governor of Maine, I used to say that I wanted Maine to have the toughest environmental standards in the country coupled with the country's most predictable, user-friendly process. A project's desirability should be based upon its merits, and its viability should not be determined by its opponents' ability to delay the regulatory process.

What Can Be Done?

Part of the solution is to do precisely what the distinguished Chairman and Ranking Member of this subcommittee are doing – get a bunch of smart people in a room to talk about the issue. For my part, I would like to zero in on two specific issues.

First, as I suggest in my list of principles, our permitting procedures need substantial revision. To this point, the example of the Maine Power Reliability Program (MPRP) proves instructive.

In 2003, Central Maine Power embarked upon an upgrade of Maine's electrical system, adding to the company's network of substations and transmission lines that stretch from the town of Eliot on the New Hampshire border to Orrington, where it connects to transmission lines from northern and eastern Maine. The project was expected to inject more than $1 billion in spending into the region's economy. For context, 96% of the project fell within or immediately adjacent to the existing right-of-way.

In the eleven years since its inception, MPRP has experienced numerous permitting and regulatory barriers that significantly hampered its development. Specifically, developers had to go into over 70 towns to acquire permits, many of which have differing requirements for approval. In one town, over 30 public meetings were held! The permitting costs alone topped $200 million and took more than four years.

This kind of regulatory delay is problematic on its face – it creates uncertainty for stakeholders, and the costs of time and resources are considerable. But the greater problem is hidden, because some of the most significant costs come in the form of projects that are never initiated – what I like to refer to as a type of "preemptive regulatory exhaustion." If people self-select themselves out of embarking upon large, important projects because of administrative barriers, we are going to lose a lot of the dynamism that this society depends upon – particularly in the area of infrastructure development.

Referring to the challenges that Cape Wind confronted in acquiring permits, the *Wall Street Journal* made this sobering observation: "Contemplate this depressing change in America's can-do spirit: the 6.6 million-ton Hoover Dam that tamed the mighty Colorado River was finished in 1936 after a mere five years. Yet 130 offshore wind turbines, a pioneering project of President Obama's 'new energy economy,' may take three times as long to complete."[2]

This challenge underscores an essential question: Can we find a way to permit major projects at a cost that is not extraordinarily prohibitive and within a reasonable time frame without trampling on the legitimate rights of the people impacted? I believe we can. One of the first steps we could take is to address the issue of serial permitting – i.e., the phenomenon of uncoordinated and successive permitting approvals for a single project. When I was governor of Maine, we

[2] "Cape Windbags," *Wall Street Journal*, April 30, 2010.

addressed this problem by creating a system of "one-stop regulatory shopping," which put the responsibility of issuing the final permit within one agency and required all the other agencies to coordinate and consult with the lead agency.

I believe a similar process could work at the federal level, and two members of this subcommittee, Senator Portman and Senator McCaskill, have introduced a bill that takes this very approach. The bill – S. 1397, the Federal Permitting Improvement Act of 2013 – would institute some important changes to federal permitting procedures, and I am proud to announce my co-sponsorship of the bill today.

Specifically, this bill establishes a formal role for a single "lead agency" to coordinate the permitting process for major capital projects, which would yield a more transparent and predictable timeline for stakeholders. This lead agency would facilitate greater coordination between federal, state, and local permitting authorities as well as encourage concurrent reviews when practicable. Additionally, the bill would create an online portal that would track the progress of major capital projects and provide links to associated documents, which would provide much needed transparency for the public. Finally, the bill would enact litigation reforms that would reduce the default statute of limitations on NEPA suits from 6 years to 150 days, a reform that has already been applied to transportation projects through the bipartisan 2012 MAP-21 bill.

The Portman-McCaskill bill builds upon recommendations from the President's Jobs Council and the Business Roundtable, and it has the support of lawmakers and organizations from both sides of the aisle. While much is made of the partisan dysfunction in Washington these days, this bill demonstrates that there are still areas where we can find common ground. I applaud Senators Portman and McCaskill for their leadership on this issue, and I am glad to join them cosponsor of this legislation.

The second and final issue I would like to highlight for the subcommittee today is that of regulatory accumulation. Regulatory accumulation is a byproduct of the increasing number of entities vested with varying missions to protect the public. This accumulation is an entirely predictable phenomenon: if you hire a bunch of people to write workplace safety regulations, they will write workplace safety regulations. There is room for debate on the merits of this kind of institutional self-perpetuation,[3] but one thing is clear: we must find ways to revisit old regulations to make sure that they are still relevant to present circumstances and are not in conflict with requirements from other regulating bodies.

Currently, federal agencies embark upon periodic self-reviews in order to examine the utility of older regulations. However, the existing process is limited for a number of reasons, including

[3] On this point, let me commend to the subcommittee Robert Kharasch's book, *The Institutional Imperative: How to Understand the United States Government and Other Bulky Objects*, which offers a witty and incisive take on institutional behavior.

restricted budgetary and personnel resources, insufficient data collection, and competing priorities. Because of this, Senator Roy Blunt and I introduced S.1390, the Regulatory Improvement Act of 2013, which would provide an additional, expeditious mechanism through which a review of old regulations could be conducted.

The Regulatory Improvement Act would create an independent Regulatory Improvement Commission that would be tasked with reviewing outdated regulations with the goals of modifying, consolidating, or repealing regulations in order to reduce compliance costs, encourage growth and innovation, and improve competitiveness. The composition of the commission would be determined by congressional leadership and the President, and the commission would be tasked with identifying a single sector or area of regulations for consideration. After extensive review involving broad public and stakeholder input, the commission would submit to Congress a report containing regulations in need of streamlining, consolidation, or repeal. This report would enjoy expedited legislative procedures and would be subject to an up-or-down vote in both houses of Congress without amendment.

The idea for this commission came from the Progressive Policy Institute, whose economists have conducted extensive research on the topic of retrospective review. Since introduction, the bill has received significant support, including an op-ed in the *Wall Street Journal* by Staples founder and former CEO, Thomas Stemberg. The proposed legislation has been met with support from individuals and organizations on both sides of the aisle, and I urge the members of the subcommittee to consider devoting further time to the issue of regulatory accumulation and retrospective review.

Mr. Chairman, Ranking Member Portman, and members of the subcommittee, thank you for the opportunity to testify before you today. I look forward to an ongoing dialogue with you on these important topics.

Embargoed Until Delivered

EXECUTIVE OFFICE OF THE PRESIDENT
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TESTIMONY OF HOWARD SHELANSKI
ADMINISTRATOR FOR THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS
OFFICE OF MANAGEMENT AND BUDGET
BEFORE THE COMMITTEE ON HOMELAND SECURITY AND GOVERNMENT AFFAIRS
SUBCOMMITTEE ON THE EFFICIENCY AND EFFECTIVENESS OF FEDERAL PROGRAMS AND THE FEDERAL WORKFORCE
UNITED STATES SENATE

March 11, 2014

Chairman Tester, Ranking Member Portman, and members of the Subcommittee:

Thank you for the invitation to appear before you today. I am pleased to have this opportunity to discuss recent developments at the Office of Information and Regulatory Affairs (OIRA) and my priorities for OIRA going forward, especially as they relate to retrospective review of regulations and reducing the number of rules pending at OIRA for extended periods of evaluation.

Since I became OIRA Administrator this past July, it has been my privilege to work with OIRA's outstanding staff, with the first-rate leadership team at the Office of Management and Budget under Director Sylvia Burwell, and with our hardworking colleagues throughout the Executive Branch. Together we are working to achieve this Administration's and Congress' goals of promoting economic growth and opportunity while simultaneously protecting the health, safety, and welfare of Americans now and into the future.

The regulatory work that this Administration is pursuing is vital to our Nation. OIRA does not set the agencies' policy agendas; the office does work with agencies to ensure that the regulations through which they implement policies are efficient, well-designed to achieve their objectives, and based upon the best available evidence. Through the 4th fiscal year of this Administration, the net benefits of rules reviewed by OIRA total $159 billion. We are still finalizing our 5th year fiscal numbers, but expect that they will deliver at least $25 billion in additional net benefits.

I want to discuss three priorities for OIRA, both now and looking ahead: (1) the clarity and transparency of the review process and regulatory environment, (2) rigorous analysis, and (3) retrospective review of existing regulations.

I will begin with the clarity of the review process and regulatory environment. To allow people, businesses and organizations, and States and localities to plan for the future, it is important that stakeholders have notice of the Government's plans for forthcoming regulatory activity. For that

reason, OIRA is charged with assembling and publishing a *Unified Regulatory Agenda* each spring and fall, setting forth the expected regulatory actions to be undertaken by Federal agencies over the coming year. OIRA published the Fall 2013 *Unified Regulatory Agenda and Plan* just before Thanksgiving, and is on track to publish the update to the *Unified Agenda* this Spring.

The Agenda is a broad list, including all of the regulations under development or review during the next 12 months, as well as longer term actions. Such an inclusive listing makes the regulatory environment more transparent and participatory for all stakeholders, especially when combined with the annual Plan, which focuses more narrowly on regulatory actions the agencies intend to issue in proposed or final form within the upcoming fiscal year. It will therefore be a continued priority for me as OIRA Administrator to ensure timely publication of the *Unified Regulatory Agenda and Plan.*

Of similar importance to the clarity and certainty of the regulatory environment is that rules – both new rules and those already under review – move through OIRA as efficiently as resource constraints and rigorous analysis permit. It is a top priority of mine to reduce the frequency of extended regulatory reviews and to work with agencies on rules that are already under extended review. I am pleased to report that, thanks to the tireless work of OIRA staff, we have dramatically reduced the number of rules that were under review for more than 200 days and the number of rules under review for more than 90 days is down considerably and continues to fall.

Finally, in addition to improving the clarity of the regulatory environment through notice and timeliness, we are significantly updating the tools the public can use to engage in the rulemaking process. For example, OIRA worked closely with agencies to enhance regulations.gov. This website, first launched in 2003, enables citizens to search, view, and comment on proposed regulations. Among other things, the site now offers tools such as a form that guides and provides tips to the public on submitting effective comments, and several types of Application Programming Interface (API) that software developers use to build web-based, desktop, and mobile device applications integrated with regulations.gov. We continue to explore ways to make improvements to our information systems that will increase transparency, including making the disclosure of information associated with regulatory review more automated and user friendly. Those changes are still under development, but we are optimistic that they will prove both feasible and helpful.

While increasing the predictability of the regulatory process through timely review of rules and regular publication of regulatory plans and agendas is essential, Executive Orders 13563 and 13610 also make clear that flexibility and removal of unnecessary burdens are essential elements of the Federal rulemaking process, as is improving rules already on the books. As I previously testified, ensuring regulatory flexibility for small businesses and reducing regulatory burdens for everyone through the retrospective review process are high priorities for me as Administrator.

Retrospective review is a crucial way to ensure that our regulatory system is modern, streamlined, and does not impose unnecessary burdens on the American public. Even regulations that were well crafted when first promulgated can become unnecessary or excessively burdensome over time and with changing conditions. Similarly, rules that are not achieving their objectives may be in need of revision in light of experience, new evidence, or

new technology. Retrospective review of regulations on the books helps to ensure that those regulations are continuing to help promote the safety, health, welfare, and well-being of Americans without imposing unnecessary costs or missing the opportunity to achieve greater net benefits.

Executive Order 13610 asks agencies to report regularly on the progress of their retrospective review activities. Yesterday, agencies posted their most recent retrospective review updates on their websites. Taken together, Federal agencies provided updates on their initiatives, many of which are new efforts that agencies added since their July 2013 listing of look-back plans. These efforts are already saving more than $10 billion in regulatory costs in the near term, with more savings to come. Here are some additional examples that will add to these savings, including:

- The Department of Transportation issued a proposed rule to rescind the requirement that truck drivers submit and retain driver-vehicle inspection reports when the driver has neither found nor been made aware of any vehicle defects or deficiencies. This change would save tens of millions of hours in paperwork burden per year, for approximately $1.5 billion in annual paperwork time savings.
- In the area of export control regulations, streamlined licensing processes are now finalized for 11 of 17 targeted categories of export controls, with more in the works.
- The Department of Veterans Affairs issued a proposed rule to reorganize and rewrite its compensation and pension regulations making it easier and less costly for claimants, beneficiaries, veterans' representatives, and VA personnel to locate and understand those regulations.

While there is important progress on retrospective review, I think we need to do even better. At OIRA, we are working, along with colleagues elsewhere in OMB and at the agencies, on several ways to further institutionalize retrospective review as an essential component of government regulatory policy. As part of this effort, we are considering and developing several components that will make regulatory look-back a more systematic priority for agencies. Such institutionalization of retrospective review, both to ensure follow-through on existing plans and to help agencies develop their future plans, will be one of our key objectives moving forward.

Hearing before the
U.S. Senate Committee on Homeland Security and Government Affairs

Subcommittee on Efficiency and Effectiveness
of Federal Programs and the Federal Workforce

"A MORE EFFICIENT AND EFFECTIVE GOVERNMENT:
IMPROVING THE REGULATORY FRAMEWORK"

March 11, 2014

Statement of Amb. C. Boyden Gray

I am grateful for the opportunity to testify before the Subcommittee on these crucial issues. Regulatory reform has been a major issue throughout my career: in the Reagan and Bush Administrations, where we developed the landmark executive order on regulatory reform; and then in the private sector and as chairman of the ABA's Administrative Law Section; and most recently as U.S. Ambassador to the European Union, where I saw firsthand the importance of regulatory reform in the international context. Today, these issues are more important than ever, as we experience unprecedented growth in the scope and burden of the administrative state.

My testimony today focuses primarily on two issues: the much-needed reforms proposed in the Regulatory Accountability Act and other legislation; and the need to streamline the process for federal regulatory permits.

But it is also important to keep in mind not just *procedural* reforms, but also *substantive* reforms: agencies wield vast powers only because Congress has delegated them such vast powers. To truly reform the administrative state, Congress must undertake serious reforms of the underlying statutes themselves, to limit the delegations of power to the agencies.

I. The Regulatory Accountability Act (S. 1029) and Other Reforms

Since 1981, oversight of the administrative state, including the analysis of regulations' costs and benefits, has been governed primarily by executive orders: first by President Reagan's E.O. 12291, and then by President Clinton's E.O. 12866, which is still in force under President Obama. These orders have done much to improve the quality and efficiency of federal regulation, but they are not perfect. The Regulatory Accountability Act (S. 1029), which I have supported before Congress many times,[1] would substantially improve upon those executive orders in at least two ways:

First, the Act would *codify* regulatory oversight and cost-benefit analysis. It is good that Administrations have voluntarily undertaken such coordination and analysis in executive orders, but this cannot remain a matter of White House discretion. Congress needs to commit these crucial matters to federal *statutes*. And because cost-benefit analysis would become a statutory requirement for agencies, that analysis would thus be subject to judicial review, which helps to ensure that the agencies undertake such analysis rigorously and in good faith.

Second, and even more importantly, the Act would extend regulatory review and cost-benefit analysis to the so-called "independent" agencies, which have always been exempted from the White House's executive orders on regulatory review. In the Reagan Administration, we exempted "independent" agencies from the original executive orders not because we thought such White House oversight was unlawful, but rather because we thought it was politically infeasible at that time. But the times have changed dramatically: after three decades of OIRA oversight, there is no substantial opposition to subjecting "independent" agencies'

[1] I attach and incorporate my prior statements. Specifically, I testified in support of the Act before the House Judiciary Committee in October 2011 (**Attachment 1**). I testified again in support of the Act, and other regulatory reforms in September 2012 (**Attachment 2**). In July 2013, I wrote a letter for the record in a House Judiciary Committee subcommittee hearing on the Regulatory Accountability Act (**Attachment 3**). And in September 2013, I testified before a House Judiciary Committee subcommittee in support of the Act (**Attachment 4**).

regulations to OIRA review, except among hardliners who oppose any meaningful brakes on regulation *per se.*[2] Congress already imposes cost-benefit analysis requirements on some independent agencies, in very limited ways.[3] Congress is long overdue to impose such a fundamental obligation on *all* agencies, be they "independent" or "executive."

Arbitrarily exempting independent agencies from the oversight of regulatory review and cost-benefit analysis also undermines current efforts to achieve transatlantic regulatory reform and cooperation.[4] Financial services are a major component of transatlantic

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[2] In 2011, a coalition of law professors opposed the Regulatory Accountability Act, arguing that the Act's "additional hurdles" would make it more difficult for agencies to create new regulations. Their concerns about over-regulating the regulators is quite ironic: they ought to consider that perhaps the private sector feels similarly about the agencies' regulations.

[3] Congress requires the Commodity Futures Trading Commission to consider the costs and benefits of its regulations. 7 U.S.C. § 19(a). Congress similarly requires the Securities and Exchange Commission to examine certain regulations' effects on "efficiency, competition, and capital formation," which 15 U.S.C. §§ 78c(f), 78w(a)(2), 80a-2(c); *see also Chamber of Commerce v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005) ("uncertainty may limit what the Commission can do, but it does not excuse the Commission from its statutory obligation to do what it can to apprise itself—and hence the public and the Congress—of the economic consequences of a proposed regulation before it decides whether to adopt the measure") (citing 15 U.S.C. § 80a-2(c)).

[4] A recent Atlantic Council report notes:

> Because of the decentralized nature of this regulatory governance, there can be considerable variation between US agencies on substantive issues. For example, US regulatory agencies such as the CFTC and SEC have occasionally differed as to the extraterritorial effect of various provisions of the Dodd-Frank Act (DFA), even where their rules govern similar or economically identical transactions. Furthermore, independent agencies can and do break with executive agencies like the US Trade Representative—and even the US Treasury Department—on international regulatory policy. This domestic 'divergence' can, in turn, create challenges with regards to promoting a unified 'US position' across a variety of different sectors.

Atlantic Council, *The Danger of Divergence: Transatlantic Financial Reform & the G20 Agenda* (Dec. 2013), *at* http://www.atlanticcouncil.org/images/publications/Danger_of_Divergence_Transatlantic_Financial_Reform_1-22.pdf; *see also* Raymond J. Ahearn, Congressional Research Service, *Transatlantic Regulatory Cooperation: Background and Analysis* (Aug. 24, 2009) ("Congress might play an important and pivotal role in transatlantic regulatory cooperation. Through authorization and appropriations of many different independent regulatory agencies, Congress is in a position to facilitate or impede progress in this undertaking."), *at* http://www.fas.org/sgp/crs/row/RL34717.pdf.

trade, and thus their exclusion from transatlantic regulatory reform and cooperation would undermine the viability of the entire free-trade effort.

The Regulatory Accountability Act is a crucially important reform, but it is not the only welcome reform before Congress. In my 2012 testimony, I also supported several other bills, including the REINS Act (now S. 15). The REINS Act would help to restore Congress's constitutional responsibility as the nation's sole repository of legislative power. As Congress delegates ever more authority to regulators—a point that I will return to at the end of my statement—bills such as the REINS Act become ever more important. Congress must re-accept responsibility for the administrative state's burdens on American people and businesses.

II. The Federal Permitting Improvement Act (S. 1397)

There's an old joke: *In Britain, everything is permitted except that which is forbidden; in Germany, everything which is not permitted is forbidden; and in Russia, everything is forbidden, even that which is permitted.* It's a funny joke, until you begin to consider the sad state of federal permits here in the United States.

Federal statutes that establish permit requirements place immense power and responsibility in the hands of bureaucrats. The public must trust them to act in the public interest, protecting us from true dangers while not unduly stifling free enterprise and economic growth. Unfortunately, the last several years have shown us how regulators can effectively shut down projects not just by rejecting permits, but also by simply failing to process permit applications expeditiously and in good faith.

We all know the highest-profile examples, such as the Keystone XL pipeline, the Cape Wind offshore wind farm, and the government's own Yucca Mountain nuclear waste repository. In these cases and others, various regulators—and outside groups, leveraging the permit process and opportunities for litigation—managed to delay the projects by years, if not

permanently. But even more worrisome is the fact that there are myriad other examples, ones that do not earn equivalent public notice, but which are also very important to the nation's economic future, especially with respect to energy development.

The Federal Permitting Improvement Act (S. 1397) would go a long way to mitigate many of these problems. By placing OMB at the head of the new "Federal Infrastructure Permitting Improvement Council," and then by designating one specific agency as the "lead agency" for each type of multi-permit project, it would help to coordinate scattered agencies and set deadlines for the various approvals needed for a given project. (I note that the Energy Policy Act of 2005 established a similar "lead agency" role for the Federal Energy Regulatory Commission, with respect to federal approvals needed for natural gas pipelines liquefied natural gas import/export projects.[5])

And this comes at a crucially important moment in our nation's history, as we chart our energy future. The nation's vast natural gas reserves, unlocked by modern advances in hydraulic fracturing and horizontal drilling, are coming available at the very moment when we need them the most: to help supply clean electricity; to provide clean fuel for cars and trucks; and to allow the United States to Europe and other allies break free from their dependence upon Russian gas. But to fully utilize our new gas reserves, we will need to substantially increase our natural gas pipeline infrastructure, in order to move gas from the wells to the markets. According to a 2011 study by ICF International, in the next twenty-plus years America will need 1,400 miles of new gas transmission pipelines each year (*i.e.*, 43 billion cubic feet for day in new capacity).[6] Similarly, the Edison Electric Institute recently reported

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[5] 15 U.S.C. 717n(b)(1).

[6] ICF International, *North American Midstream Infrastructure Through 2035—A Secure Energy Future* 68 (June 28, 2011), *at* http://www.ingaa.org/File.aspx?id=14900. And that is in addition to roughly 17,000 miles of new "lateral" and "gathering" lines annually. *Id.*

that its members plan to spend over $50 billion on electric transmission line projects by 2023.[7] And of course those projects will create thousands of jobs, which is precisely why both the AFL-CIO and the U.S. Chamber of Commerce support this commonsense legislation. But for these projects to happen, the nation desperately needs an infrastructure permitting process that is transparent, efficient, and reliable. The point is not to rubber-stamp all projects, but rather to make sure that needed projects are not exposed to procedural abuse by either regulators or by special interests who exploit the current permitting frameworks' inefficiencies and opacity.

The bill balances all of these competing concerns by both streamlining the process and coordinating multi-agency reviews, and also ensuring that all stakeholders, including affected communities, are brought into the process as early as possible, to bring their concerns to the forefront of the process at the outset.[8] Moreover, the bill would finally set a sensible deadline for judicial review of all covered federal permitting decisions. Many statutes already provide such deadlines—FERC's approval of natural gas pipeline, for example, must be appealed no later than sixty days after FERC issues its final decision.[9] But where no such deadline currently is prescribed, a project's opponents may be bound only by the general *six-year* statute of limitations for lawsuits challenging federal actions.[10] Such projects cannot simply rely on the hope that a federal court will shorten that deadline, after the fact, through "laches" and other equitable doctrines. Federally approved projects need the certainty that this bill's 180-day statute of limitations would provide. And that 180-day window is extremely generous

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[7] Edison Electric Institute, *Transmission Projects: At A Glance*, at iii (Mar. 2013), *available at* http://www.eei.org/issuesandpolicy/transmission/Documents/Trans_Project_lowres.pdf.

[8] *See* Section 3(c)(2)(i) (requiring the new Federal Infrastructure Permitting Council to promulgate "best practices" on "early stakeholder engagement, including fully considering and, as appropriate, incorporating recommendations provided in public comments on any proposed covered project").

[9] 15 U.S.C. § 717r(b).

[10] 28 U.S.C. § 2401(a).

to those who wish to appeal the agencies' action in good faith, and not merely to use the old six-year statute of limitations to cast a cloud of uncertainty over projects that regulators have reviewed and approved.

In sum, I strongly support this bill. Let me also offer a few suggestions for further improvement:

The bill binds *federal* agencies administering federal laws.[11] But many federal permits are administered by *state* authorities, under the Clean Water Act, the Clean Air Act, the Coastal Zone Management Act, and other laws. Those "cooperative federalism" laws offer some of the best opportunities for project opponents (including the regulators themselves) to delay or block projects[12]; thus, I hope the Senate will consider including those state agencies, administering federal laws, in this new framework.[13]

And for that same reason, this bill might not be interpreted as covering the Keystone XL pipeline and other international oil pipelines. International oil pipelines are

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[11] *See* Section 2(1), defining "agency" in accordance with 5 U.S.C. § 551: "each authority of the Government of the United States." Elsewhere, the Act defines "authorization" to include all approvals "under Federal law, whether administered by a Federal or State agency," *see id.* § 2(3), but the Act places binding obligations only on "agencies"—*i.e.*, federal agencies. Similarly, the Act's provision for a "permitting timetable" directs the "lead" federal agency to consult with the "State in which the project is located," but it ultimately provides permitting deadlines only for "each participating agency"—*i.e.*, only federal agencies. *See* Section 4(c)(2)(A).

[12] *See, e.g., Islander East Pipeline Co. v. Ct. Dep't of Envtl. Protection*, 525 F.3d 141 (2d Cir. 2008) (state agency successfully rejected a pipeline's Clean Water Act application, six years after the project first applied for its permit, and two years after the Second Circuit reversed the agency's original denial); *AES Sparrows Point LNG, LLC v. Smith*, 527 F.3d 120 (4th Cir. 2008) (county unsuccessfully attempted to block LNG project by purporting to amend the State's program administering the Clean Water Act). *See generally, e.g.*, John Darby *et al.*, *The Role of FERC and the States in Approving and Siting Interstate Natural Gas Facilities and LNG Terminals After the Energy Policy Act of 2005—Consultation, Preemption and Cooperative Federalism*, 6 Tex. J. Oil Gas & Energy L. 335 (2011); Jacob Dweck *et al.*, *Liquefied Natural Gas (LNG) Litigation After the Energy Policy Act of 2005: State Powers in LNG Terminal Siting*, 27 Energy L.J. 473 (2006).

[13] Moreover, many important interstate projects are blocked by state regulators administering *state* laws, even after Congress's Energy Policy Act of 2005 was enacted to take jurisdiction away from state regulators delaying or denying necessary permits. *See Piedmont Envtl. Council v. FERC*, 558 F. 3d 304 (4th Cir. 2009).

governed not by statutes administered by agencies, but by executive orders asserting inherent presidential power in the absence of statutes.[14] Although the President delegates much of this inherent authority to the Secretary of State,[15] at least one federal court has held that this exercise of non-statutory presidential power still is not "agency" action (and therefore not subject to review under the Administrative Procedure Act).[16] For Keystone XL, this problem would be solved by other pending bills that would expressly approve the Keystone XL pipeline by an Act of Congress[17] (or, in the previous Congress, by bills reassigning the President's permitting authority to the Federal Energy Regulatory Commission[18]). But out of an abundance of caution, the Federal Permitting Improvement Act should expressly and unambiguously include "Presidential Permits" in its coverage.

Second, this bill's $25 million threshold[19] would leave many federal permit applicants unprotected. While I understand that such a threshold makes life easier for regulators, it has the perverse effect of exposing to regulatory abuse the companies *most vulnerable* to the burdens of cost and delay—small businesses.

And it would do so at a moment when small businesses face unprecedented permitting burdens. As many have discussed (including in recent Supreme Court arguments), the EPA now interprets Title II of the Clean Air Act as imposing pre-construction "PSD"[20] permit requirements for all companies emitting more than just 100 or 250 tons of greenhouse

[14] *See, e.g.*, Paul W. Parfomak *et al.*, Congressional Research Service, *Keystone XL Pipeline Project: Key Issues*, at Appx. A (Dec. 2, 2013).

[15] Exec. Order 13337 (Apr. 30, 2004); Exec. Order 11423 (Aug. 16, 1968).

[16] *The Sisseton–Wahpeton Oyate v. Dep't of State*, 659 F. Supp. 2d 1071, 1080-82 (C.D. S.D. 2009).

[17] S. 17; S. 582.

[18] H.R. 3548 (112th Cong.).

[19] *See* Section 2(5)(A)(ii).

[20] That is, "prevention of significant deterioration."

gases per year. By EPA's own estimate, this covers *82,000* sources per year (as opposed to the 280 sources that needed PSD permits before greenhouse gas emissions were regulated).[21] As EPA itself explains, these "commercial and residential sources—the great majority of which are small businesses—would each incur, on average, almost $60,000 in PSD permitting expenses."[22] For now, EPA says that it will exclude small businesses by unilaterally exercising sole discretion to "tailor" its rule to cover only larger emitters. But EPA and the Justice Department refuse to guarantee that small businesses will permanently receive these initial protections—in fact, Solicitor General Verrilli conceded at oral argument that EPA "might" ultimately impose its requirements on all businesses that emit more than 100 or 250 tons of greenhouse gases per year.[23] Given the EPA's expansive view of its own authority, and the burdens that EPA could place on small businesses through the state regulators administering the federal PSD program,[24] the Federal Permitting Improvement Act's protections should be extended to smaller businesses.

Finally, Congress must keep in mind that the mere setting of deadlines for agency action cannot guarantee that the regulators will be forced to administer the permit process in good faith. We saw this in the case of Keystone XL: Congress set a deadline for the

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[21] 75 Fed. Reg. 31514, 31556 (June 3, 2010).

[22] *Id.*

[23] *See* Oral Arg. Tr., *Util. Air. Regulatory Group v. EPA*, Nos. 12-1146 *et al.*, at 86 (Kagan: "Are you essentially looking for the number that captures the same class of emitters?" Verrilli: "I think—I don't know that it will be the same, but I think it'll be—but I think the—the class will be a lot smaller than the class under EPA's current understanding of what it means to emit 250 tons per year"); *see also id.* at 56 (Alito: "I thought EPA said, well, we're going to work toward [the statutory thresholds]." Verrilli: "No, this is—this is to try to get to the statutory threshold . . . he agency has discretion in deciding what constitutes the potential to emit 250 tons per year.").

[24] I was counsel to several States in the *Utility Air Regulatory Group v. EPA* case, filing *amicus* briefs at the certiorari and merits stages, highlighting the burdens that EPA' program would place on state permitting authorities.

President to decide the permit application, and when the deadline came, the President simply denied the permit, asserting that the years of reviews leading up to that point were insufficient for him to make a decision. Simply put, regulators facing deadlines can threaten to simply veto projects, forcing the applicants either to file new applications (as Keystone XL did) or to acquiesce to time extensions. So long as regulators enjoy those powers, it will remain incumbent upon Congress to actively monitor regulators' conduct, and to hold them accountable.

* * *

Let me close with one last, crucial point. Procedural reforms are important, but so are *substantive* reforms. As the Supreme Court said, "an agency literally has no power to act . . . unless and until Congress confers power upon it."[25] By the same token, an agency is capable of irrationally or abusively thwarting permit applicants only because Congress has given them such power.

Thus, the true root of the problem is not procedural, but substantive: Congress delegates far too much power to agencies. Procedural reforms can go a long way toward mitigating the problems of agency abuse, but those problems will be truly cured only when Congress amends the agencies' statutes, to truly limit the powers delegated to the agencies.

Congress has done this before. In 1987, Congress repealed the Powerplant and Fuel Use Act of 1978's prohibition against power companies using natural gas to generate electricity. It can do so again—it *must* do so again, beginning with the open-ended delegations of power, in the Clean Air Act and other federal statutes, which empower regulators to use permit requirements to block crucially important projects.

Similarly, while it is important for the White House to direct agencies to

[25] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

undertake "look-back" reviews to reconsider the ongoing costs and benefits of existing regulations,[26] it is even more important for *Congress* to retrospectively review the costs and benefits of the agencies' cumulative body of regulations. Congress's review is necessary to ensure that "independent" agencies are fully subjected to retrospective review.[27] But even more importantly, Congress's own review is necessary to ensure that *all* agencies' costs and benefits are reviewed rigorously in good faith.

We don't trust corporations to audit their own financial statements; we require them to undergo independent audits by outside accountants. By the same token, an agency's own assessment of its regulations' costs and benefits is much less useful than an assessment conducted by an independent auditor, such as the Government Accountability Office or the Congressional Budget Office—*especially* when agencies consistently skew their own cost-benefit analysis, as former OIRA Administrator Susan Dudley has demonstrated.[28] To rely on agencies to police their own cost-benefit analysis is to ignore James Madison's warning in *Federalist No. 10*: "No man is allowed to be a judge in his own cause, because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity."

To conduct such review, and to systematically correct Congress's over-delegation of power to agencies, requires the work of more than just this agency. Congress should consider establishing a joint committee specifically tasked with solving these problems, which are among the most pressing issues of our time.

Thank you, again, for the opportunity to testify. I welcome your questions.

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[26] *See, e.g.*, Exec. Order 13563 (Jan. 18, 2011); OIRA Memorandum for the Heads of Executive Departments and Agencies, "Final Plans for Retrospective Analysis of Existing Rules" (June 14, 2011), *at* http://www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-25.pdf.

[27] The White House's retrospective-review order did not require independent agencies to participate; rather, the White House asked independent agencies to *volunteer* to undertake retrospective review. *See* Exec. Order 13579 (July 11, 2011).

[28] Susan E. Dudley, *Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation*, 47 Bus. Econ. 165 (2012).

Addendum 1

Statement of Amb. C. Boyden Gray

Oct. 25, 2011

Hearing Before the House Judiciary Committee:

"H.R. 3010: The Regulatory Accountability Act of 2011"

Hearing before the
U.S. House of Representatives
Committee on the Judiciary

H.R. 3010: THE "REGULATORY ACCOUNTABILITY ACT OF 2011"

October 25, 2011

Statement of Amb. C. Boyden Gray

I am pleased to have been asked to testify before the Committee on the "Regulatory Accountability Act of 2011." I have previously testified before this committee on matters of administrative law, including the reauthorization of the Administrative Conference of the United States (ACUS).

At the ACUS hearing seven years ago, I testified that "the U.S. administrative law system, I believe, is the best in the world. It is the most transparent, the fairest and the most economically productive." I still believe that. But as I went on to say at that hearing, our administrative law system has retained its prized status only because of the government's commitment to maintaining and improving the system over time.

"The Administrative Procedure Act," I said then, "is unrecognizable in the sense of its original language. It has been largely rewritten, not in derogation of congressional intent, but to flesh out what the words mean." Or, to adapt Justice Holmes's famous words, the life of administrative law has been both logic and experience.

The bill before this committee, the "Regulatory Accountability Act of 2011," is a welcome next step in the continued improvement of administrative law. The Act applies the lessons of both logic and experience to solve some of the stark problems raised by the regulatory state's sudden, exponential new growth. On matters of public finance, energy and the environment, telecommunications, and health care, regulatory agencies are taking broadly worded statutory grants of power and applying them in ways that threaten to undermine America's competitive standing in the world, and American liberty at home.

Against that backdrop, the Act has many provisions that I welcome, including new formal-hearing requirements for major rules and high-impact rules, and an ongoing duty to revisit previously promulgated major rules and high-impact rules. But I would like to focus my testimony today on two subjects: First, and most importantly, the Act codifies cost-benefit requirements that have governed the Executive agencies for three decades, but which have not governed "independent" agencies, such as the Commodities Futures Trading Commission (CFTC). And second, the Act prudently reinforces the courts' important oversight role through judicial review.

Cost-Benefit Analysis and the Independent Agencies

Since President Reagan signed Executive Order 12291, and continuing through its successors, including Executive Order 12866, the President has required Executive agencies to subject newly proposed regulations to cost-benefit analysis, under the guidance of the Office of Information and Regulatory Affairs (OIRA).

That centralized review has substantially improved the regulatory process, promoting efficiency while simultaneously ensuring democratic accountability.

Those Executive Orders did not reach the "independent" agencies, however; instead, the Orders exempted those agencies from their coverage. But as those "independent" agencies—the CFTC, NLRB, and Federal Reserve, for example—have come to exert exponentially greater weight on the economy, their exemption has become utterly untenable.

Regardless of the extent to which "independent" agencies are subject to presidential control, Congress *clearly* controls them through its legislative power, and it may subject those agencies to procedural requirements—such as cost-benefit analysis and the opportunity for formal on-the-record hearings—and other forms of Administration oversight and judicial review.

And that is what the Committee proposes to do here. By incorporating the provisions of the Regulatory Accountability Act of 2011 into the overarching structure of the Administrative Procedure Act—which does *not* exempt independent agencies—Congress will commit the independent agencies to OIRA guidance and oversight, including the discipline of cost-benefit analysis and alternatives analysis.

To illustrate the critical importance of this improved oversight, let me offer three recent examples of "independent" agency regulatory efforts that would be improved by OIRA oversight, cost-benefit analysis, and alternatives analysis.

1. Financial Regulation

The Dodd-Frank Wall Street Reform and Consumer Protection Act, passed just last year, created an astonishing plethora of rulemaking requirements by a variety of agencies. According to the Davis Polk law firm's widely read legislative analysis, Dodd-Frank will require at least two hundred and forty-three rulemakings. The vast majority of those rules will be issued by "independent" agencies: the CFTC, SEC, and Federal Reserve, and the newly created Financial Stability Oversight Council and Consumer Financial Protection Bureau.

So far, the result has not been encouraging; in fact, it is cause for serious concern. The CFTC's Inspector General issued a report on April 15, 2011, detailing the flaws that have pervaded the CFTC's proposal of derivatives rules. Most significantly, the IG found that the CFTC's cost-benefit analysis for the new rules was directed not by economists, but by lawyers: "it is clear that the Commission staff viewed [cost-benefit analysis] to constitute a legal issue more than an economic one, and the views of the Office of General Counsel therefore trumped those expressed by the Office of Chief Economist." The Regulatory Accountability Act, by contrast, would commit economic analysis to the economists. Better still, where the CFTC treated cost-benefit analysis as a "caboose," the Regulatory Accountability Act places it firmly near the front of the procedural train, in the required notice of proposed rulemaking.

The Federal Reserve's own regulatory work under Dodd-Frank raises similar red flags. Last month, JP Morgan Chase's CEO, Jamie Dimon, publicly

questioned Fed Chairman Bernanke whether the myriad Dodd-Frank regulatory initiatives would together do more harm than good. Chairman Bernanke answered, "nobody's looked at it in all detail," and that only after imposing these onerous new regulations would they "figure out where the cost exceeds the benefit and ... make the appropriate adjustments." Chairman Bernanke's reasoning puts the cart before the horse—or, to borrow the CFTC's terms, the caboose before the locomotive. Regulators should ascertain the costs and benefits of their regulations *before* deciding whether to impose those regulations on American people and industry, as the Regulatory Accountability Act's proposed framework recognizes.

Even more worrisome, in those same comments Chairman Bernanke disclaimed even the Fed's ability to calculate whether the cumulative effect of new regulations would have a positive or negative impact on credit: "You know, it's just too complicated. We don't really have quantitative tools to do that."

Those are unsatisfactory answers, especially when the apparent cost of new regulations—in terms of both compliance and substantive effect—may be so great. No one argues that cost-benefit questions can always be resolved to the nearest dollar, but in all cases the rigor of cost-benefit review must at least ascertain generally whether regulations do more harm than good. This is particularly important in cases of landmark regulatory reform, which overturns many long-settled arrangements and imposes new burdens on people and businesses. Our independent regulatory agencies can and must do better, and the reforms proposed in this Act will help to ensure that they do.

2. Telecommunications Policy

As the Nation's dependence upon communications technology and the Internet increases, so does the FCC's role in the Nation's economy. Most significantly, a majority of FCC commissioners have committed to establishing "net neutrality" rules governing current and future Internet infrastructure, culminating with the promulgation of net neutrality rules in December 2010. That policy is surrounded by uncertainty, both with respect to whether the policy is lawful (in light of the D.C. Circuit's decision last year in *Comcast v. FCC*), and with respect to whether those rules are justified as a matter of policy. While I would not currently offer conclusions on either of those points, I will note that the Commissioners are deeply divided on the question of whether the net neutrality policy's costs outweigh its benefits. The FCC's majority asserts that "the costs associated with these open Internet rules are likely small," but the dissenting commissioners urge that the policy will result in "less investment," "less innovation," "increased business costs," "increased prices for consumers," and "jobs lost." These are precisely the questions that should be—and, under the proposed Act, would be—resolved through rigorous cost-benefit analysis undertaken under OIRA oversight.

3. Energy and Environmental Policy

Let me end with one more brief example. The Nation's energy and environmental policies implicate not just one agency, but many. Spreading responsibility for these issues across many agencies is an invitation for substantial inefficiency, perhaps even cases of agencies working at cross-purposes. And so

inter-agency coordination is critically important. While the agencies with greatest influence over U.S. energy policy probably are the Department of Energy and the Environmental Protection Agency (EPA), three other important regulatory bodies—the Federal Energy Regulatory Commission (FERC), the Nuclear Regulatory Commission (NRC), and (because of its derivatives jurisdiction) the CFTC—are "independent" agencies, and thus exempt from the current OIRA review process. Going forward, the FERC's jurisdiction over natural gas pipelines will help to shape the Nation's development of newly abundant natural gas supplies; the NRC, meanwhile, largely controls the future of our electric power supply through its regulation of nuclear power generators, and the proposed Yucca Mountain site. The proposed Act would help to ensure that those agencies' rules promote the public interest in a coordinated procedure that includes the Energy Department and EPA.

<u>Judicial Review</u>

Let me note one other salutary feature of the Act: it strengthens judicial review of agency actions on questions of regulatory interpretation, factual issues, and cost-benefit analysis, at least in cases where the agency's own process fails to satisfy the Act's heightened requirements. Judicial review of agency action requires a delicate balance—the applicable standards of review are deferential, but those standards must be firmly enforced. The Act strikes that balance well.

And the courts are clearly able to maintain that balance of deference and critical scrutiny, as the D.C. Circuit demonstrated most recently deciding the case of *Business Roundtable v. SEC*. There, the court struck down the SEC's "proxy

access rule" upon narrow but firm review of the SEC's failure to satisfy an SEC-specific statute requiring the agency to consider costs and benefits. As the court explained in that case:

> We agree with the petitioners and hold the Commission acted arbitrarily and capriciously for having failed once again . . . adequately to assess the economic effects of a new rule. Here the Commission inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters.

The SEC's failings in that case exemplify some of the regulatory failings that the Regulatory Accountability Act would work to prevent; the court's analysis exemplifies the well-tailored solution that courts would provide under the Act.

I would stress, however, that Congress must not dilute those generally applicable standards of judicial review by enacting separate statutes that tighten the scope of judicial review and thus effectively immunize certain agency decisions. The best recent example of this troubling trend is the Dodd-Frank Act, which prohibits the Supreme Court and other federal courts from considering, among other things, whether the Treasury Secretary's "resolution determination" (*i.e.*, forced liquidation) of a financial company was lawful; instead, the courts may only review whether his factual determinations and analysis was reasonable.

After I criticized Dodd-Frank's troubling features in a *Washington Post* op-ed last December, the Treasury Department's General Counsel replied in a letter to the editor, asserting that Dodd-Frank "explicitly provides for judicial review" of such draconian agency determinations, but neglecting to admit that judicial review

would be strictly limited in terms of both scope and time, thus nullifying the protections that judicial review ordinarily provides.

Congress should not insulate those types of agency actions from judicial review. The Regulatory Accountability Act is a welcome sign that this Committee values the courts' oversight role, and I hope that it signals Congress's continued commitment going forward.

* * *

The White House recently claimed that "the annual cost of regulations has not increased during the Obama administration"; that the last two years of President Bush's administration "imposed far higher regulatory costs than did the Obama administration in its first two years"; and that "there has been no increase in rulemaking in [the Obama] administration." Those are very broad—and, to put it gently, counterintuitive—claims. Only by requiring the federal agencies to calculate the costs and benefits of their regulations, and then subjecting those projections to the scrutiny of public comment, can we know with greater certainty whether new regulatory initiatives, especially landmark initiatives affecting economic growth and energy infrastructure development, do more good than harm.

Again, I am grateful for the opportunity to testify in favor of the Regulatory Accountability Act of 2011. It draws on, and improves upon, the foundation laid in the Administrative Procedure Act and the Executive Orders on regulatory review.

<u>Addendum 2</u>

Statement of Amb. C. Boyden Gray

Sept. 20, 2012

Hearing Before the House Judiciary Committee:

"Regulation Nation: The Obama Administration's Regulatory Expansion vs. Jobs and Economic Recovery"

Hearing before the
U.S. House of Representatives
Committee on the Judiciary

"REGULATION NATION: THE OBAMA ADMINISTRATION'S REGULATORY EXPANSION VS. JOBS AND ECONOMIC RECOVERY"

September 20, 2012

Statement of Amb. C. Boyden Gray

I am pleased to have been asked to testify before the Committee on the question of the current regulatory burden on the national economy. This is the single most pressing domestic policy matter of the day, and I am honored to contribute to the discussion.

As it is so often said, "history never repeats itself, but it rhymes." This seems to be one of those moments. Thirty years after President Reagan campaigned in large part on a platform of regulatory reform, and successfully reformed much of the administrative state, we find ourselves largely back where we began. Regulatory agencies once again rival the tax code and monetary policy in their ability to retard economic growth. And they are doing so at the worst possible opportunity—when we need economic growth more than ever.

Fortunately, while we have encountered these problems before, we also know from experience the best remedies: require regulatory agencies to subject their rules to the rigors of meaningful cost-benefit analysis; erect administrative law procedures that are transparent, predictable, and reliable; maximize the fruits of market-based solutions; and craft substantive statutes that give clear direction to—and place clear limits upon—the agencies that will administer them.

The solution is not just to "roll back some regulations, and call me in the morning," as President Obama glibly mischaracterized in his speech to the Democratic Party's convention earlier this month. Rather, the question is how we can best structure the administrative state to make its regulations both effective and efficient. It is not a question of deregulation; it is a question of *smart* regulation.

I. The Costs of Regulation and of Regulatory Uncertainty

I am a lawyer, not an economist, and so I defer largely to the economic analysis offered by my esteemed co-panelist, Professor John Taylor of Stanford and the Hoover Institution. That said, even a lawyer can recognize the basic facts of regulatory burden on the economy.

First, the Obama Administration's regulations impose immense costs on the economy. By their own estimate, their regulations have cost up to $32.1 billion—but that figure covers just forty-five so-called "major rules" issued in 2009, 2010, and 2011.[1] Of course, we should view the Administration's self-serving estimates of regulatory costs and benefits with a skeptical eye: as Susan Dudley, former Administrator of the White House Office of Information and Regulatory Affairs ("OIRA") and now Director of George Washington University's Regulatory Studies Center, noted recently in *Business Economics*,

> Agencies have strong incentives to demonstrate through analysis that their desired regulations will result in benefits that exceed costs. . . . A better baseball analogy might note that, as the regulatory game is now structured, OIRA is the umpire—the sole judge of the balls and strikes pitched by the agencies. When the umpire boasts with such

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[1] See OIRA, "Draft 2012 Report to Congress on the Benefits and Costs of Federal Regulations and Unfunded Mandates on State, Local, and Tribal Entities," at p. 19 (Mar. 2012), *at* http://www.whitehouse.gov/sites/default/files/omb/oira/draft_2012_cost_benefit_report.pdf.

> enthusiasm about his team's score, one has to wonder who will ensure that the game is played fairly.[2]

In sharp contrast to the Administration's own estimate, the American Action Forum (led by Douglas Holtz-Eakin, former chief economist of the President's Council of Economic Advisers and director of the Congressional Budget Office) estimates that this Administration's regulatory burden on the economy exceeds $450 billion.[3]

Second, regulators impose costs not just through the regulations that they directly impose, but also through the problem of regulatory uncertainty. While some assert that regulatory uncertainty is a "canard,"[4] a team of Stanford and Chicago economists recently demonstrated the impact of policy uncertainty, analyzing data that "foreshadows drops in private investment of 16 percent within 3 quarters, industrial production drops of 4 percent after 16 months, and aggregate employment reductions of 2.3 million within two years"—findings that "reinforce concerns that policy-related uncertainty played a role in the slow growth and fitful recovery of recent years[.]"[5]

Of course, the problem is not "regulatory uncertainty" in the abstract. Uncertainty beats certainty when the certainty in question is a massively costly regulation

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[2] Susan E. Dudley, "Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation," *Business Economics* 47:3, at p. 175 (2012)

[3] *See* "President's Regulatory Record in the Courts" (Aug. 21, 2012), *at* http://americanactionforum.org/topic/president's-regulatory-record-courts.

[4] *See, e.g.*, Jonathan Cohn, "The GOP's Uncertainty Canard" (Oct. 4, 2011), *at* http://www.tnr.com/blog/jonathan-cohn/95748/republican-regulation-uncertainty-business-data-cantor-mishel-bartlett.

[5] Scott R. Baker, Nicholas Bloom, and Steven J. Davis, "Measuring Economic Policy Uncertainty" (June 4, 2012), *at* http://faculty.chicagobooth.edu/steven.davis/pdf/PolicyUncertainty.pdf.

with no benefits. Rather, the problem is costly, inefficient regulation, and the possibility of still more costly, inefficient regulation.

II. Regulatory Reform's Record

As I noted at the outset of this testimony, our present problems are challenging but not wholly unprecedented. The present economic malaise deservedly draws comparisons to the malaise of the 1970s, when heavy regulation combined with other headwinds to prevent economic growth. To the credit of economist Alfred Kahn, lawyer Stephen Breyer, and others, the Carter Administration and Congress began to wake up to those problems in the late 1970s. But Ronald Reagan truly understood the challenge, and he campaigned vigorously in 1980 on a platform of regulatory reform. Once elected, he put his mandate into effect by commissioning a serious reform effort.

I was privileged to participate in that process, which culminated with the landmark Executive Order 12291, creating the Office of Information and Regulatory Affairs and requiring executive branch agencies to subject regulations to meaningful cost-benefit analysis under OIRA's direction, among other things. President Reagan's Republican successors, Presidents George H.W. Bush and George W. Bush, continued to support and expand upon those reforms. And even Reagan's Democratic successor, President Clinton, largely maintained those reforms in Executive Order 12866.

To be clear, the Reagan reforms were not perfect. Most significantly, E.O. 12291 limited its requirements to *executive* agencies (the Environmental Protection Agency, Labor Department, and so on) but did not touch the so-called "independent" agencies—the Securities and Exchange Commission, National Labor Relations Board, and others. Even though the President has constitutional authority to impose such rules on the independent

agencies, the Reagan Administration stayed its own hand. It was a prudential decision: at that time, independent agencies' regulatory impact was much less than it is today.

The results were overwhelming, as seen in the economic growth that followed. But aside from the well-known statistical evidence, my favorite illustration of the success of Reagan's regulatory reforms is a personal anecdote. A couple of years after President Reagan promulgated his reforms, when the economy was in recovery, I encountered the wife of the C.E.O. of one of the Big Three U.S. auto companies. She said her husband attributed the recovery to the regulatory reform program—not just because of the revision of old regulations but because of the signal that new regulations would be efficient and transparent enough to enable the companies to focus less on Washington and more on cars and consumers.

III. Regulatory Reform Recedes

Unfortunately, in politics few victories are truly permanent, and regulatory reform is no exception. In recent years, the benefits of past reforms have been eroded by a number of developments.

First, and as I just noted, the so-called "independent" agencies have come to impose a much greater burden on the economy. The Securities and Exchange Commission, National Labor Relations Board, and other longstanding agencies wield immensely more power than they once did. Once-sleepy agencies such as the Commodity Futures Trading Commission were given vast new powers by the Dodd-Frank Act and other new laws. And Dodd-Frank created another new independent agency, the Bureau of Consumer Financial Protection ("CFPB"), which threatens economic costs of its own. While the Obama Administration has made much of the fact that it nominally asked independent agencies to

review the costs and benefits of their regulations, the executive branch has not taken serious steps to actually align the costs and benefits of independent agencies' regulations. Moreover, Congress is increasingly unwilling to oversee those agencies, as demonstrated by the Dodd-Frank provisions preventing Congress even from reviewing the budget of the self-funded CFPB.

Second, the executive branch's control of cost-benefit analysis increasingly lacks credibility, as Professor Dudley's aforementioned article demonstrates. The Administration's self-serving claims that its regulatory benefits far exceed the costs of unprecedented environmental regulations should be met with serious suspicion. One notorious case study is the Administration's proposed valuation methodology for power plants' "cooling water intake" facilities. To establish the value of fish harmed by those facilities, the EPA conducted a survey asking respondents how much they would be "willing to pay" to save certain species of fish. Of course such a study is wildly hypothetical, even ridiculous—few citizens are ever presented with a real-life situation in which they would pay real money to save real fish. And so the results, garnered from well-meaning respondents, were predictably skewed in favor of high values. That flimsy methodology might next be used to support costly regulations on the nation's energy producers.

Furthermore, too much of the current Administration's regulations are driven not by transparent notice-and-comment rulemakings, but through backroom deals. Perhaps the most notorious example of this is the Administration's "bailout" of the auto industry. Seizing upon the industry's 2008-2009 crisis, the White House and EPA coerced auto companies into agreeing to accept overwhelmingly burdensome greenhouse gas regulations before a single word of the proposal was ever drafted—a disturbing incident recounted

forcefully in the House Oversight and Government Reform Committee's new report.[6] To the extent that the Administration forced this deal upon private industry, it was a serious abuse of power; to the extent that some inside the industry welcomed the arrangement, to the detriment of other auto companies and the economy at large, it was a textbook case of the "crony capitalism," backroom deals, and logrolling inherent in a regulatory process that lacks true transparency. As regulations proliferate, so do the opportunities for secret deals.

IV. Regulatory Reforms To Solve Our Modern Problems

Given those and other problems, the basic solutions clearly present themselves. Regulatory cost-benefit analysis requirements must be extended to independent agencies. And the framework for such review can no longer be designed and executed exclusively by the executive branch, without outside oversight.

In the last two years, Congress has seen many legislative reforms incorporating these solutions. In fact, the bills considered and passed by this Committee, described below, constitute a comprehensive set of reforms that would solve many or all of the problems at hand.

First, the Regulatory Accountability Act (H.R. 3010) takes the cost-benefit analysis currently required of agencies pursuant to executive orders and applies it to *all* agencies, executive and "independent" alike, as a matter of federal statutory law. By requiring agencies to analyze costs and benefits on the record, it gives the public an opportunity to comment upon the estimates of those costs and benefits, ultimately improving the final calculations by increasing the amount and quality of information in the

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6 "A Dismissal of Safety, Choice, and Cost: The Obama Administration's New Auto Regulations" (Aug. 10, 2012), *at* http://oversight.house.gov/wp-content/uploads/2012/08/CAFE-Report-8-10-12-FINAL.pdf

administrative record. Furthermore, the Act would generally require agencies to choose the lowest-cost rulemaking alternative that meets the objectives of the underlying substantive statute—it would not supersede the requirements of, *e.g.*, the Clean Air Act, but rather it would simply require regulators to select the regulatory framework that achieves those requirements at the lowest possible cost. And the Act preserves agency discretion to choose a higher-cost alternative if necessary to protect the public health, safety, and welfare, so long as the additional benefits justify the additional cost.

The Regulatory Accountability Act would also require agencies to consider market-based alternatives to command-and-control rulemaking. This is a particularly laudable proposal. During my time in the Reagan and Bush Administrations, some of the government's greatest legislative successes promoted market-based solutions. The Clean Air Act, for example, fostered a system of emissions trading that allowed the free market to solve some of the most vexing regulatory challenges presented by air pollution. (That genuine cap-and-trade system stands in marked contrast to the phony "market-based" cap-and-tax solution promoted more recently by climate-change activists.) Unfortunately, recent legislation has trended in the other direction—for example, much of the regulatory mandates imposed by Dodd-Frank, to end the problem of "Too Big To Fail" banks, are counterproductive and destined to fail, whereas simple capital requirements would allow the market to solve the problem itself. The Regulatory Accountability Act will help to correct this trend, by restoring market-based solutions to a central place in regulatory policymaking.

By requiring — not merely inviting — the White House to impose cost-benefit analysis requirements on "independent" agencies, and then subjecting that review to deferential-yet-meaningful judicial review, the Act would ensure that the President and

OIRA will take responsibility for independent agencies, with the further oversight provided by judicial review of the agency's eventual output.

The Regulatory Flexibility Improvements Act (H.R. 527) targets the problems that regulatory agencies currently create for small businesses. By requiring agencies to account for the total impact of regulations—their cumulative direct and indirect impacts—and by requiring the agencies to open the door to small businesses to advise on the real-world effects of regulation, the Act would create a process to prevent regulators from placing heavy regulations on the nation's job creators without first exercising due care and prudence. True to its name, this bill improves the existing Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act, to finally achieve those laws' original aims.

The "REINS" Act (H.R. 10) would restore Congress's constitutional responsibility as the nation's sole repository of legislative power, by requiring Congress to vote for major regulations before they go into effect. For the past century, Congress has delegated more and more power to regulators, raising serious constitutional concerns. Even if such delegations will not be remedied in the courts under the old "Nondelegation Doctrine," they *certainly* can be remedied by Congress itself. The REINS Act is a laudable attempt by Congress to prevent itself from abdicating its constitutional responsibilities, refocusing accountability on legislators who—unlike federal bureaucrats—are directly accountable to the People.

The Regulatory Freeze for Jobs Act (H.R. 4078, Title I) recognizes that the current economic malaise calls for immediate action. To that end, the Act would freeze regulations costing more than $100 million until the unemployment rate finally reaches 6

percent. The Act, which includes exceptions necessary to protect national security and public health, safety, and welfare, would create the "breathing room" necessary to repair the economic injuries exacerbated by over-burdensome regulations. We need to grow the economy, not the *Federal Register*.

The Sunshine for Regulatory Decrees and Settlements Act (H.R. 4078, Title III) would help to solve the longstanding collusion between activist groups and sympathetic regulators, which use sham ("sue and settle") litigation and resultant "consent decrees" to constrict or prevent true transparency in the regulatory process. By requiring greater public notice, tougher judicial scrutiny, a more open judicial process, and (in the Attorney General's office) direct accountability at the highest levels of the Executive Branch, this Act would ensure that "public interest" litigation truly promotes, not impairs, the public interest.

Finally, the "RAPID" Act (H.R. 4078, Title V) recognizes that the burdens of regulation are not limited to the rulemaking process. Countless federal statutes require companies to apply for permits before undertaking job-creating projects. And too often, regulators, aided by activist groups, now seem to think that the goal of the permitting process is not to get safe, sound projects approved, but to block projects for political, ideological, or even fundraising reasons. The RAPID Act would streamline the permitting process, directing agencies to work together in a single, coherent process that promotes efficiency and accountability, including meaningful deadlines for the completion of administrative reviews and for the filing of suits challenging permit approvals.

Some have argued that those legislative reforms are too heavy-handed, placing too much power in the hands of federal judges to micromanage regulatory or economic decisions better left to experts. I disagree. These reforms do not prescribe any

substantive outcomes; they do not nullify substantive statutes governing finance or the environment; rather, they merely erect procedures that will require the White House and agencies to seriously consider costs, benefits, and alternatives. This is a light burden and, given the burdens that agencies place on persons and businesses, an entirely proportionate one.

The best example of how these reforms would work in practice is the D.C. Circuit's recent decision in *Business Roundtable v. SEC*,[7] an appeal of the S.E.C.'s "proxy access rule." A federal statute required the S.E.C. to consider the costs and benefits of that rule. When the proxy access rule was appealed in the D.C. Circuit, the court did not try to undertake its own economic analysis, or even micromanage the agency's own substantive review; rather, the court reviewed only whether the S.E.C. had sufficiently considered the evidence in the record before the agency, and whether the agency had meaningfully considered and replied to affected parties' arguments. Because the agency clearly had failed to satisfy those minimal requirements, the court vacated the rule and remanded the matter to the agency—it gave the agency another bite at the apple. The court did not prohibit the S.E.C. from reaching the same substantive outcome; it simply required the agency to satisfy the applicable procedural requirements.

Some have argued that these statutes would make regulators' work too difficult. Last autumn, when this committee convened a hearing on the Regulatory Accountability Act (H.R. 3010), a group of law professors wrote that "the procedural and analytical requirements added by" the Act "would be enormously burdensome."[8] I could

[7] 647 F.3d 1144 (D.C. Cir. 2011).

[8] *See* https://www.law.upenn.edu/blogs/regblog/Letter%20to%20House%20Judiciary%20Committee%20on%20HR%203010.pdf

not myself devise a better parody of the myopic, regulator-centric view of the regulatory state. Administrative agencies place enormous burdens on American companies every day; those burdens, not procedural requirements placed on bureaucrats, are the problem that cries out for immediate alleviation.

And again, reforms of the kind reflected in *Business Roundtable v. SEC* do not impose unreasonable burdens on either regulators or the courts. Indeed, the caseload of the D.C. Circuit, which is the principal reviewing court, appears to be declining, not growing.[9] And within that shrinking caseload, the court's regulatory docket is declining even faster.[10]

* * *

In closing, let me note that the Reagan Administration's successes are not the only examples worth considering. In the 1990s and early 2000s, the "sick man of Europe" was Germany—perhaps a difficult fact to recall, considering that Germany is today the engine of European economic growth and the continent's best hope for economic stability. Germany saved itself first and foremost through regulatory reform in 2003-2005, especially with respect to labor law restrictions, and the reforms worked very quickly to turn Germany's recovery around.

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[9] *See, e.g.*, "Judicial Business of the United States Courts," 2011 Annual Report of the Director of the Administrative Office of the U.S. Courts, at p. 59 (http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf).

[10] *See, e.g.*, Hon. Douglas H. Ginsburg, *Remarks Upon Receiving the Lifetime Service Award of the Georgetown Federalist Society Chapter*, 10 GEO. J. L. & PUB. POL'Y 1, 2 (2012) ("The number of cases filed in the D.C. Circuit has declined more or less continuously over the last twenty-five years. More surprising, the number of administrative law cases filed in our court also has declined over that period, again consistently, and the percentage of administrative law cases on our docket is lower now than it has been in all but two of the last twenty-five years.").

Germany's resurgence has shaped much of the modern political-economic debate, not just on questions of European bailouts but also on the issue of the proposed U.S.-E.U. free trade agreement—a treaty that could dramatically reduce transatlantic over-regulatory friction.

But amidst all of that, we must not neglect the lessons relevant to the issues before this committee today. Germany's Chancellor Merkel is urging Europe to recognize that structural reform is needed to rescue the continent from economic disaster. We should heed her warnings as well, and begin by reforming the structure of the administrative state.

Addendum 3

Letter & Statement of Amb. C. Boyden Gray

July 17, 2013

Hearing Before the House Judiciary Committee,
Subcommittee on Regulatory Reform, Commercial and Antitrust Law:

"H.R. 2122: The Regulatory Accountability Act of 2012"

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July 17, 2013

Hon. Spencer T. Bachus, III, *Chairman*
Subcommittee on Regulatory Reform & Antitrust Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Hon. Stephen Cohen, *Ranking Member*
Subcommittee on Regulatory Reform & Antitrust Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Re: H.R. 2122 — The Regulatory Accountability Act of 2013

Dear Chairman Bachus and Ranking Member Cohen,

I am pleased for this opportunity to support the Regulatory Accountability Act of 2013, H.R. 2122. As I explain in the enclosed statement, I twice testified before the full Judiciary Committee in support of the previous version of this Act. The reforms set forth in the bill, including the extension of cost-benefit review to "independent" agencies, is just as important today as it was in the last Congress.

In my career, I have been fortunate to observe the regulatory state from a variety of vantage points: in the Executive Branch, as White House Counsel and on President Reagan's original task force on regulatory reform; as Ambassador to the European Union, where regulatory friction between the United States and Europe was (and is) a critically important issue; as a private lawyer counseling clients who must bear the regulatory burdens imposed by federal agencies; and in my own civic work and public advocacy.

In all of those capacities, I have witnessed time and time again the harms that overburdensome regulation threatens to the free market, to economic growth, and to principles of good government. Regulation promotes the public interest when its benefits outweigh its costs, and to that end the Regulatory Accountability Act would protect the public interest.

Sincerely,

Boyden Gray

C. Boyden Gray

cc: Hon. Bob Goodlatte, Chairman, House Committee on the Judiciary
Hon. John Conyers, Jr., Ranking Member, House Committee on the Judiciary

Statement of C. Boyden Gray:

The Regulatory Accountability Act of 2013 (H.R. 2122)

July 16, 2013

In the last Congress, I twice testified before the full Judiciary Committee in support of the Regulatory Accountability Act of 2011. In October 2011, I testified in support of the Regulatory Accountability Act specifically. In September 2012, I returned to testify in support of the full suite of regulatory-reform bills that the Committee had passed, including the Regulatory Accountability Act and the REINS Act.

I enclose my prepared statements from those hearings, for inclusion in the record for last week's hearing on H.R. 2122, the Regulatory Accountability Act of 2013.[1] I stand by the specific points that I raised in those hearings, and I reiterate my support for the Act in general. As I said in 2011, "[b]y incorporating the provisions of the Regulatory Accountability Act . . . into the overarching structure of the Administrative Procedure Act—which does *not* exempt independent agencies—Congress will commit the independent agencies to OIRA guidance and oversight, including the discipline of cost-benefit analysis and alternatives analysis." Furthermore, I continue to support the Act's effort to "strengthen[ ] judicial review of agency actions on questions of regulatory interpretation, factual issues, and cost-benefit analysis, at least in cases where the agency's own process fails to satisfy the Act's heightened requirements." The Act strikes the "delicate balance" of setting standards that are not burdensome, yet ensuring that those standards will be firmly enforced, and it will improve rulemaking at all agencies, "executive" and "independent" alike, as my prior statements explain.

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1 My statements also remain available on the Committee's web site, at http://judiciary.house.gov/hearings/pdf/Gray%2010252011.pdf and http://judiciary.house.gov/hearings/Hearings 2012/Gray 09202012.pdf.

In the intervening months since the last hearing, we have witnessed only more evidence of the need to bring "independent" agencies into the framework for accountability and oversight established by Executive Orders 12291 and 12866. Let me offer two examples.

1. Consumer Financial Protection Bureau's Auto Loan "Bulletin"

The Dodd-Frank Act established the Consumer Financial Protection Bureau (CFPB), a new regulatory agency enjoying an unprecedented combination of independence and insulation from the executive, legislative, and judicial branches and an effectively open-ended statutory mandate. My constitutional objections to the CFPB's establishment are a matter of public record,[2] but the CFPB's execution of its broad powers raises substantial questions regarding cost-benefit analysis.

Dodd-Frank's Section 1022(b)(2) nominally requires the CFPB to conduct cost-benefit review of its rulemakings. But because the statute does not require the CFPB's analysis to be vetted by the experts at the Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget (*i.e.*, the experts that vet other agencies' regulations under Executive Order 12866), it inherently lacks the accountability added by outside review of its work by both OIRA and other stakeholder agencies, which the OIRA-review process currently requires for other agencies' rulemakings.[3]

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[2] *See, e.g.*, C. Boyden Gray & John Shu, *The Dodd-Frank Wall Street Reform & Consumer Protection Act of 2010: Is It Constitutional?*, ENGAGE: THE JOURNAL OF THE FEDERALIST SOCIETY'S PRACTICE GROUPS, vol. 11, no. 3 (2010), *available at* http://www.fed-soc.org/doclib/20101209_BoydenShuDoddFrankWP.pdf; C. Boyden Gray & Jim R. Purcell, *Why Dodd-Frank Is Unconstitutional*, WALL ST. J. (June 22, 2012).

[3] *See* Cass R. Sunstein, *The Office of Information and Regulatory Affairs: Myths and Realities*, 126 HARV. L. REV. 1838 (2013). Unfortunately, even OIRA's work can shows signs of pro-regulatory bias, including the inflation of a proposed rule's estimated costs. *See, e.g.*, Susan E. Dudley, *Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation*, 47 BUS. ECON. 165 (2012). And agencies have found tactics to "insulate" themselves from OIRA's review. *See* Jennifer Nou, *Agency Self-Insulation Under Presidential Review*, 126 HARV. L. REV. 1755 (2013).

But even more worrisome is the fact that that statute limits the cost-benefit requirement to CFPB's *rulemakings*, thus allowing the CFPB to evade the rigors of cost-benefit review by imposing regulatory requirements and policies through "guidance" or other informal proceedings instead of actual rulemakings. For example, in March 2013 the CFPB announced a new policy of regulating auto loans. This was a controversial development, given that Dodd-Frank expressly limits the CFPB's jurisdiction over aspects of such loans,[4] but it was all the more controversial because it imposed this policy through a "bulletin" rather than through an actual rulemaking.[5]

The Regulatory Accountability Act doubly protects against these kinds of agency maneuvers. First, by reaching independent agencies, the Act would prevent the CFPB and other independent agencies from conducting such proceedings outside the scope of OIRA oversight. Second, the Act's Section 4 takes care to expressly reach not just rulemakings but also "guidance."

2. GAO's Study Of Agencies' Flawed Cost-Benefit Analyses

In December 2012, the Government Accountability Office (GAO) issued a study of several agencies' rulemakings promulgated pursuant to the Dodd-Frank Act.[6] The GAO's findings were troubling: independent agencies' evaluation of regulations' costs and benefits often omitted key elements of the OMB's best practices for regulatory review, and often did not seriously attempt either to fully quantify costs and benefits or to candidly discuss the strengths and weaknesses of their "qualitative" analyses.[7]

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4 Dodd-Frank Act § 1029.

5 CFPB Bulletin 2013-02 (Mar. 21, 2013), *available at* http://files.consumerfinance.gov/f/201303_cfpb_march_-Auto-Finance-Bulletin.pdf.

6 *Dodd-Frank Act: Agencies' Efforts to Analyze and Coordinate Their Rules*, GAO-13-101 (2012), *available at* http://www.gao.gov/assets/660/650947.pdf.

7 *See, e.g., id.* at 18-19.

This is not the first time that the GAO has found independent agencies' analyses lacking,[8] and it follows the prominent criticisms published by the Inspectors General of the Securities and Exchange Commission and the Commodity Futures Trading Commission.[9] I fully expect that the independent agencies will continue to have such problems, and that reports detailing them will continue to issue, until Congress finally subjects independent agencies to truly meaningful oversight by OIRA and the courts.

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Again, these examples reiterate and reconfirm the points I made in the Judiciary Committee's previous hearings; thus, I enclose my previous statements in support of the Regulatory Accountability Act, for inclusion in the record.

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[8] GAO, *Dodd-Frank Regulations: Implementation Could Benefit From Additional Analyses and Coordination*, GAO-12-151 (2011), *available at* http://www.gao.gov/assets/590/586210.pdf.

[9] CFTC, Office of the Inspector General, *A Review Of Cost-Benefit Analyses Performed by the Commodity Futures Trading Commission in Connection with Rulemakings Undertaken Pursuant to the Dodd-Frank Act* (June 13, 2011), *available at* http://www.cftc.gov/ucm/groups/public/@aboutcftc/documents/file/oig_investigation_061311.pdf; SEC, Office of the Inspector General, Report of Review of Economic Analyses Conducted by the Securities and Exchange Commission in Connection With Dodd-Frank Act Rulemakings (June 13, 2011), *available at* http://www.sec-oig.gov/Reports/AuditsInspections/2011/Report_6_13_11.pdf.

Addendum 4

Statement of Amb. C. Boyden Gray

Sept. 30, 2013

Hearing Before the House Judiciary Committee,
Subcommittee on Regulatory Reform, Commercial and Antitrust Law:

**"The Office of Information and Regulatory Affairs:
Federal Regulations and Regulatory Reform"**

Hearing before the
U.S. House of Representatives
Subcommittee on Regulatory Reform, Commercial and Antitrust Law of the Committee on the Judiciary

"THE OFFICE OF INFORMATION AND REGULATORY AFFAIRS: FEDERAL REGULATIONS AND REGULATORY REFORM"

September 30, 2013

Statement of Amb. C. Boyden Gray

I am honored to have been invited to testify before the Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law on the subject of the Office of Information and Regulatory Affairs (OIRA) of the Office of Management and Budget (OMB).

The focus of my remarks today will be the regulatory reforms that can be accomplished by subjecting proposed regulations to the oversight of OIRA—perhaps the most powerful office in the administrative apparatus of our Government, but one of its best-kept secrets.

I. REGULATORY ACCOUNTABILITY ACT

In the last Congress, I twice testified before the full Judiciary Committee in support of the Regulatory Accountability Act of 2011.[1] As I said in 2011, "[b]y incorporating the provisions of the Regulatory Accountability Act . . . into the overarching structure of the Administrative Procedure Act— which does *not* exempt independent agencies—Congress will commit the independent agencies to OIRA guidance and oversight, including the discipline of cost-benefit analysis and alternatives analysis." This remains, to my mind, one of our administrative law system's most critical needs.

[1] My statements remain available on the Committee's web site, at http://judiciary.house.gov/hearings/pdf/Gray%2010252011.pdf and http://judiciary.house.gov/hearings/Hearings 2012/Gray 09202012.pdf.

A. OIRA OVERSIGHT OF INDEPENDENT AGENCIES

Before examining cost-benefit analysis in particular, I will spend a moment on the virtues of OIRA oversight in general. As federal agencies proliferate and the regulatory burden on the American public and American industry grows, it becomes increasingly important that the myriad cooks stirring the regulatory soup be subject to meaningful oversight. As Sally Katzen observed after her time as OIRA Administrator under President Clinton, "the problems that plague our nation do not fit neatly into one agency"; "nor are they likely to be solved by one regulatory action."[2] Subjecting independent agencies to OIRA oversight would therefore result in "better coordinated and coherent regulatory actions, and ultimately better decisionmaking."[3] The need to bring independent agencies into the fold grows more urgent as Congress delegates more and more power to them. The Securities and Exchange Commission, National Labor Relations Board, and other longstanding agencies wield immensely more power than they once did. And the Dodd-Frank Act granted vast new powers to existing independent agencies such as the Commodity Futures Trading Commission, and created another new independent agency, the Consumer Financial Protection Bureau ("CFPB"), with unprecedented power and unprecedented independence from all three branches of government. Exempting independent agencies from OIRA oversight is sometimes justified by the argument that, whereas executive agencies are the President's, independent agencies are Congress's. The premise is no longer true if it ever was: Congress is increasingly unwilling to oversee those agencies, as demonstrated by the Dodd-Frank provisions preventing Congress even from reviewing the budget of the self-funded CFPB.

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[2] Sally Katzen, *OIRA at Thirty: Reflections and Recommendations*, 63 ADMIN. L. REV. 103, 108, 111 (2011) (emphasis omitted).

[3] *Id.* at 110.

As a general matter, Congress and the courts can only react to administrative rules after they have already been promulgated; meaningful oversight of the administrative state must start in the executive branch. Indeed, beginning with my experience as counsel to Vice President Bush, I have observed that centralized review of administrative agencies is most effective when the Office of the Vice President takes an active role in its supervision. I have seen ambitious regulatory reform succeed with vice presidential leadership, and I have seen inter-agency efforts fail for want of centralized leadership. Whether or not the Vice President takes an active role in regulatory matters, however, it is now more important than ever that OIRA be granted the authority it needs to direct and supervise a coherent administrative policy across all federal agencies—not just those whose heads serve at the pleasure of the President.

It is well accepted that the President's constitutional duty to faithfully execute the laws gives him authority to subject independent agencies to OIRA review.[4] But this is an area in which congressional cooperation, rather than unilateral executive action, is preferable for purposes of inter-branch comity. While the Obama Administration has made much of the fact that it nominally asked independent agencies to review the costs and benefits of their regulations, the executive branch has not taken serious steps to actually align the costs and benefits of independent agencies' regulations. And OIRA does not discuss proposed independent agency rules with the public as it does with respect to executive agencies.

B. COST-BENEFIT ANALYSIS

One of the greatest virtues of the Regulatory Accountability Act is that it would subject independent agencies to the requirement that they establish that the costs imposed by their

[4] *See* VIVIAN S. CHU & DANIEL T. SHEDD, PRESIDENTIAL REVIEW OF INDEPENDENT REGULATORY COMMISSION RULEMAKING: LEGAL ISSUES (Sept. 10, 2012), at 12-15, *available at* http://www.fas.org/sgp/crs/misc/R42720.pdf.

rules are justified by the benefits they accrue.

Cost-benefit analysis is sometimes unfairly disparaged as tool of conservatives, and as designed to "promote a deregulatory agenda under the cover of scientific objectivity."[5] Both claims are false.

1. IDEOLOGICALLY NEUTRAL

The detractors of cost-benefit analysis tend to oppose it for its results, not its method. For example, there are those who criticize economic analysis because it "has never been the environmentalist's friend."[6] But economic analysis viewed in the abstract is ideologically neutral. When it is used correctly, cost-benefit analysis promotes regulations that are good for society by deterring regulations (from any political quarter) that would elevate the interests of a few above the good of the whole.[7]

Conservatives are by no means the only advocates of cost-benefit analysis.

Sally Katzen opposed codification of cost-benefit analysis while in office,[8] but she had a change of heart after she left OIRA. In 2011, she wrote that "requirements for economic analysis and centralized review should be extended to the Independent Regulatory

[5] FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 9 (2004); *see also Daniel A. Farber, Rethinking the Role of Cost-benefit Analysis*, 76 U. CHI. L. REV. 1355, 1366 (2009) (arguing that cost-benefit analysis is motivated by "political bias against regulation") (reviewing ACKERMAN & HEINZERLING, *supra*); Jonathan D. Guynn, *The Political Economy of Financial Rulemaking After* Business Roundtable, 99 VA. L. REV. 641, 644 (2013) (citing arguments that cost-benefit analysis is "designed to further a deregulatory agenda by creating regulatory gridlock, imposing an impossible burden of proof on the regulators or making it prohibitively expensive for agencies to issue regulations.").

[6] Lisa Heinzerling, *Lisa Heinzerling Responds to Richard Revesz on Cost-Benefit Analysis*, GRIST (May 15, 2008), http://grist.org/article/cost-benefit-environmentalism-an-oxymoron/

[7] Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 225-26 (1999) ("[W]e argue that CBA, properly understood, is consistent with every political theory that holds that the government should care about the overall well-being of its citizens.").

[8] Katzen, *supra* note 2, at 108.

Commissions (IRCs—those multi-headed agencies, such as the Securities and Exchange Commission, the Federal Communications Commission, the Federal Trade Commission, etc., whose members do not serve at the pleasure of the President and can be removed only for cause."[9] Citing reports by OMB and Resources for the Future, Katzen observed that "IRCs do not typically engage in the rigorous economic analysis that has come to be expected (and generally accepted) for executive branch agencies. In light of the wave of financial regulations triggered by the Dodd-Frank Act, Katzen called extending cost-benefit analysis to independent agencies "a no-brainer."[10] I agree.

And Cass Sunstein, who headed OIRA during President Obama's first term and authored *The Cost Benefit State: The Future of Regulatory Protection*, published by the American Bar Association, wrote that "us[ing] cost-benefit analysis in a highly disciplined way" to "ensur[e] that high costs are justified by high benefits—is especially important in a period of economic difficulty."[11]

This is not a new idea. Judge Patricia Wald, former Chief Judge of the D.C. Circuit, appointed by President Carter, wrote in 1983 that "[e]ven when the governing statute says nothing specific about economic principles, the agency may rely heavily on economic analysis to meet more general statutory criteria, such as determining that rates are 'just and reasonable.' "[12]

Given the bipartisanship support its practitioner's have voiced for cost-benefit analysis, it should come as no surprise that it "has become a mainstream tool used by Presidents of both

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[9] *Id.* at 109.

[10] *Id.* at 110.

[11] Cass R. Sunstein, *Humanizing Cost-Benefit Analysis*, Euro. 2 J. OF RISK REG. 3 (2011).

[12] Patricia M. Wald, *Judicial Review of Economic Analysis*, 1 YALE J. ON REG. 43, 43 (1983).

parties and members of Congress on both sides of the aisle."[13]

2. FACILITATION OF JUDICAL REVIEW

Requiring agencies to subject their regulations to cost-benefit analysis also allows for meaningful judicial review of agency action. Without substituting its policy judgment for that of the agency, a court can ensure that the agency employed its expertise to craft a regulation that will do more good than harm.

Perhaps the best example of judicial review of administrative cost-benefit analysis is *Business Roundtable v. S.E.C.*, the very case that sparked some of the loudest complaints that cost-benefit analysis is a partisan device. That case involved an appeal of the S.E.C.'s "proxy access rule." A federal statute required the S.E.C. to consider the costs and benefits of that rule. When the proxy access rule was appealed in the D.C. Circuit, the court did not try to undertake its own economic analysis, or even micromanage the agency's own substantive review; rather, the court reviewed only whether the S.E.C. had sufficiently considered the evidence in the record before the agency, and whether the agency had meaningfully considered and replied to affected parties' arguments about the costs of the rule. The agency clearly had failed to satisfy those minimal requirements. As the court held, the agency had "inconsistently and opportunistically framed the costs and benefits of the rule; failed adequately to quantify the certain costs or to explain why those costs could not be quantified; neglected to support its predictive judgments; contradicted itself; and failed to respond to substantial problems raised by commenters."[14] But rather than dictating an outcome, the court vacated the rule and remanded the matter to the agency—it gave the agency another bite at the apple. The court did

[13] Guynn, *supra* note 5, at 644-45.

[14] *Business Roundtable v. SEC*, 647 F.3d 1144, 1148-49 (D.C. Cir. 2011).

not prohibit the S.E.C. from reaching the same substantive outcome; it simply required the agency to satisfy the applicable procedural requirements.

This is precisely what the reviewing court is supposed to do when confronted with an agency's statutorily required cost-benefit analysis. In the words of Judge Wald,

> Where a governing statute requires the agency to conduct an economic analysis as a basis for action, . . . the court must insist that it be done and that it include whatever components Congress specified. Little or no deference is due the agency in such threshold scrutiny. . . . The court must assure itself that the statutorily mandated decision . . . has been made and that the agency's reasoning was rational and supported by evidence. An agency cannot immunize arbitrary or capricious substantive decisions by dressing them up in the Emperor's clothes of economic jargon.[15]

Business Roundtable demonstrates that judicial review of cost-benefit analysis promotes a rulemaking process driven by expertise and not mere politics. There is no good reason why independent agencies, which are responsible for some of the costliest rules in the Federal Register, should be exempt from this process.

3. PROBLEMATIC IMPLEMENTATION OF COST-BENEFIT ANALYSIS

None of this is to suggest that simply requiring agencies to perform cost-benefit analysis of their rules is a fail-proof solution for the problems of regulatory mismanagement. Like any form of analysis, cost-benefit analysis may reflect the value judgments of the regulator. Congress, and this body in particular, must therefore be vigilant in regulating the regulators.

[15] Wald, *supra* note 12, at 50.

This vigilance is especially needful in the current Administration, which, by its own estimate, has imposed up to $51.5 million in regulatory costs between 2009 and 2012, considering only the 58 so-called "major rules" issued during that time period.[16] And that self-serving estimate should be viewed skeptically: As former OIRA Administrator Susan Dudley has observed,

> Agencies have strong incentives to demonstrate through analysis that their desired regulations will result in benefits that exceed costs. . . . [A]s the regulatory game is now structured, OIRA is the umpire—the sole judge of the balls and strikes pitched by the agencies. When the umpire boasts with such enthusiasm about his team's score, one has to wonder who will ensure that the game is played fairly.[17]

In sharp contrast to the Administration's own estimate, the American Action Forum (led by Douglas Holtz-Eakin, former chief economist of the President's Council of Economic Advisers and director of the Congressional Budget Office) estimates that this Administration's regulatory burden on the economy exceeds $518 billion.

The Administration's estimate of the benefits of its regulations is just as problematic as its estimate of costs. Take, for example, the Administration's estimate of the "social cost of carbon"—a figure that is critical to the cost-benefit analyses for an increasing number of greenhouse gas emissions-related regulations.[18] According to former OIRA Administrator Cass Sunstein, the social cost of carbon (now $36 per ton), which was the product of an interagency

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[16] *See* OIRA, 2013 Draft Report to Congress on the Benefits and Costs of Federal Regulations and Agency Compliance with the Unfunded Mandates Reform Act," at 19, at http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf.

[17] Susan E. Dudley, *Perpetuating Puffery: An Analysis of the Composition of OMB's Reported Benefits of Regulation*, BUS. ECON. 47:3, at 175 (2012).

[18] Cass R. Sunstein, Working Paper: *The Real World of Cost-Benefit Analysis: Thirty-Six Questions (and Almost as Many Answers)*, HARV. L. SCHOOL PUB. L. & LEGAL THEORY WORKING PAPER SERIES, Paper No. 13-11 (May 15, 2013) (Social cost of carbon "values are used to establish the benefits of regulatory efforts to reduce greenhouse gas emissions, and they have played a significant role in many rulemakings."), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2199112 (citing Light-Duty Vehicle Greenhouse Gas Emission Standards, 75 Fed. Reg. 25,324, 25,520–524 (May 7, 2010) (to be codified at 49 C.F.R. pts. 531, 533, 536, 537, 538); Energy Conservation Standards for Residential Refrigerators, Refrigerator-Freezers, and Freezers, 76 Fed. Reg. 57,516, 57,559–57,561 (Sept. 15, 2011) (to be codified at 10 C.F.R. pt. 430)).

working group, is "binding until [it is] changed" by "some kind of formal process." Until that time, says Sunstein, "[a]gencies and departments (including OIRA and others within the Executive Office of the President) may not reject such documents, in whole or in part, in the context of particular rules."[19] But those estimates have never been the subject of a stand-alone notice and comment procedure. And the estimated cost declared by the committee is particularly problematic because the risk it attributes to carbon emissions (and therefore the benefit of their reduction) is global in scope, whereas the cost of regulation is necessarily borne only by entities within the United States. Thus, EPA justifies regulations that impose enormous costs on U.S. industry by reference to benefits that are shared the world over. This is in tension with an OMB Circular stating the commonsense proposition that "[a]nalyses should focus on benefits and costs accruing to the citizens of the United States in determining net present value. Where programs or projects have effects outside the United States, these effects should be reported separately."[20] My point here is not to propose a solution but to guard against complacent acceptance of cost-benefit analysis by administrative agencies.

II. REGULATORY FLEXIBILITY ACT

Under the current Regulatory Flexibility Act, each of three "covered agencies"[21] must convene a review panel to assess the impact on small businesses of ill-defined economically "significant" proposed rules.[22] The Regulatory Flexibility Improvements Act (H.R. 2542) would give primary responsibility for this assessment to the Chief Counsel for Advocacy of the

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[19] *Id.* at 4.

[20] OMB Circular A-94 (revised), *available at* http://www.whitehouse.gov/omb/circulars_a094.

[21] The "covered agencies" are EPA, CFPB, and OSHA. 5 U.S.C. § 609(d).

[22] *Id.* § 509(a).

Small Business Administration,[23] and would require the interagency panel that receives the Chief Counsel's report to include an OIRA employee.[24] The Act would also allow OIRA, not just the originating agency—to decide what rules are covered.[25] Finally, the Act would require executive agencies to submit to OIRA (and to Congress) their periodic reviews of small business impacts of their existing rules.[26] Including OIRA in the process in these ways would promote consistency and reduce bias in the assessment of regulatory impacts on small businesses—a matter of vital importance to the economy.

III. SUNSHINE FOR REGULATORY DECREES AND SETTLEMENTS ACT

Although the primary subject of my remarks has been OIRA, I would be remiss if I did not address the Sunshine for Regulatory Decrees and Settlements Act (H.R. 1493). This legislation would help to solve the longstanding collusion between activist groups and sympathetic regulators, which use sham ("sue-and-settle") litigation to achieve through "consent decrees" administrative rules that cannot be obtained through the ordinary regulatory process. Relegating administrative rulemaking to backroom deals between administrators and particular interested parties undermines the transparency, public participation, and agency expertise that are the hallmarks of our administrative law system. By requiring greater public notice, tougher judicial scrutiny, a more open judicial process, and (in the Attorney General's office) direct accountability at the highest levels of the Executive Branch, this Act would ensure that "public interest" litigation truly promotes, not impairs, the public interest.

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[23] H.R. 2542, sec. 6, amending 5 U.S.C. § 609(b).

[24] *Id.*, amending 5 U.S.C. § 609(d).

[25] *Id.*, amending 5 U.S.C. § 609(e).

[26] *Id.*, sec. 7, amending 5 U.S.C. § 610.

Testimony of Katherine McFate, President and Chief Executive Officer,
Center for Effective Government before the
Senate Homeland Security and Governmental Affairs Committee Subcommittee
on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce Hearing on
A More Efficient and Effective Government:
Improving the Regulatory Framework
March 11, 2014

Chairman Tester, Ranking Member Portman and members of the Subcommittee, thank you for the opportunity to testify on the effectiveness and efficiency of the federal government's regulatory system. My name is Katherine McFate, and I am President and Chief Executive Officer of the Center for Effective Government, a national policy organization formerly known as OMB Watch, and co-chair of the Coalition for Sensible Safeguards (CSS). CSS is a coalition of more than 150 consumer, small business, labor, scientific, research, good government, health, and environmental organizations joined in a commitment to protect and improve the system of public protections that secures the American quality of life and encourages economic innovation and equitable growth.

For 30 years, my organization has scrutinized the operations of the executive branch of the federal government, with the aim of ensuring that government operations are as open and transparent as possible, that our regulatory system protects people and the environment, and that public officials advance the interests and priorities of working Americans.

A critical function of government is to protect us from preventable hazards and harm. We expect our government to keep contaminated food off the grocery store shelves and out of restaurants; to ensure employers follow health and safety rules, obey labor standards, and prevent toxic emissions from poisoning our air, water, and communities; and to keep unsafe drugs and toys out of the hands of children. Americans know that the system of standards and safeguards that was put in place in this country over the past hundred years has encouraged our businesses to innovate, produced broadly shared prosperity, and given us among the highest living standards on the planet.

Our system of public protections has made this country a safer, better place. Workplace fatality rates are a fraction of what they used to be. Our air is less polluted. Cars are phenomenally safer than just a few decades ago. Lead paint and asbestos have been largely relegated to the past. Our rivers are cleaner. Tainted food is a public health emergency, not a weekly occurrence. American companies produce safer toys than when I was a child.

But continued progress is at risk. Our infrastructure – both public and private – is aging, increasing the risks of chemical spills like the one that occurred in West Virginia or the Chevron

explosion in Richmond California or the coal ash containment pond collapse in North Carolina. Resources for enforcement are declining.[1] A substantial proportion of the skilled workforce involved in inspection and oversight will soon retire.[2] And our standards and safeguards are not keeping up with the fast march of scientific knowledge.

It simply takes too long to modernize health and safety rules so that they reflect current scientific evidence about health and environmental risks and hazards. And as more obstacles, duplicative analyses, and legal challenges have been put in place to slow or prevent scientific knowledge from being translated into public action, children and elderly people develop preventable cancers, toddlers are run over in driveways, workers are debilitated by respiratory diseases, and the planet warms.

As requested, my testimony will focus on only one step in the current federal regulatory process: the way review of proposed and final rules by the Office of Management and Budget's Office of Information and Regulatory Affairs (OIRA) impacts the timeliness of rulemaking and the character of the final rules that emerge.

OIRA's Regulatory Review Process: Slow and Opaque

Our federal regulatory system is slow, complex, and opaque. It allows big firms in regulated industries multiple opportunities to represent their concerns about the costs of health, safety, and environmental standards. At the same time, the voices of public interest advocates, workers, parents, consumers, and small businesses are less often heard and seem to be less valued.

Although OIRA was created by an act of Congress in 1980,[3] its responsibilities have significantly expanded through executive orders. President Ronald Reagan used an executive order to require all federal rulemaking agencies to submit proposed rules to OIRA for review and approval, and this practice has continued under Democratic presidents. Centralized review of federal agency actions by the Office of Management and Budget is a way for presidents to exert more control over the actions of federal agencies as they work to implement congressional laws.

The current regulatory review framework was established by President Bill Clinton in 1993. His E.O. 12866 requires agencies to submit drafts of proposed and final significant rules (defined as rules estimated to cost over $100 million). By focusing on significant rules, OIRA was able to dramatically cut its workload while maintaining its ability to oversee the most important agency regulations.

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[1] Nick Schwellenbach, *What's At Stake: Austerity Budgets Threaten Worker Health and Safety*, Center for Effective Government, August 2013. Available at: http://www.foreffectivegov.org/whatsatstake-workersafety; "Public Protections Budget Dashboard – FY 15," Center for Effective Government, March 6, 2014. Available at: http://www.foreffectivegov.org/public-protections-budget-dashboard-fy15.
[2] See Schwellenbach, p. 4.
[3] PL 104-13. The Paperwork Reduction Act. Available at: http://www.gpo.gov/fdsys/pkg/PLAW-104publ13/html/PLAW-104publ13.htm.

Under President George W. Bush, OIRA took a more aggressive posture and imposed rigorous guidelines for cost-benefit analyses and peer review on proposed rules. OIRA began commenting on drafts of proposed rules earlier in their development, before the agency had officially submitted them for review. These changes gave OMB even more political control over the rulemaking process and increased its opacity. In January 2007, President Bush even amended Clinton's policies with Executive Order 13422.[4] The order was controversial: the regulatory policy officers at agencies were given authority to quash new rulemakings unilaterally, a power that had formerly rested only with appointed agency heads. And for the first time, agency guidance documents (voluntary, often interpretive statements of an agency's stance on a particular issue) were subject to OIRA's centralized review.

Current Policy

When President Obama came into office, he revoked the Bush-era order[5] and reaffirmed Clinton-era policy (Executive Order 12866). However, OMB has continued to subject agency guidance documents to centralized OIRA review.[6] And President Obama's first term OIRA Administrator, Cass Sunstein, used the power the position afforded, as Georgetown Law Professor Lisa Heinzerling expertly documented in a recent law review article. He imposed cost-benefit analysis "wherever the law allows" and would not allow rules to go forward if they didn't pass OIRA's tests. Heinzerling writes, "The person who leads OIRA is, in the rule-making domain, effectively the boss of members of the President's Cabinet."[7]

So, while the executive order essentially establishes another set of review hurdles for agencies tasked with developing public health, labor, and environmental standards, it also sets a deadline for OIRA to review rules and requires OIRA to be transparent about the changes that it asks agencies to make to the rules they propose.

The executive order requires that OIRA review a proposed regulation (or take a pass on reviewing it) within 90 days of receiving it from an agency. That deadline can be extended once for up to 30 days upon agency request and OMB Director approval. In other words, *at the most*, OIRA has four months to review a proposed standard and either approve it or send it back to the agency with proposed changes.

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[4] George Bush, "Executive Order 13422 of January 18, 2007, Further Amendment to Executive Order 12866 on Regulatory Planning and Review," The White House, Jan. 18, 2007. Available at: http://edocket.access.gpo.gov/2007/pdf/07-293.pdf.

[5] Barack Obama, "Executive Order 13497 of January 30, 2009, Revocation of Certain Executive Orders Concerning Regulatory Planning and Review," The White House, Jan. 30, 2009. Available at: http://edocket.access.gpo.gov/2009/pdf/E9-2486.pdf.

[6] Peter R. Orszag, "Memorandum for the Heads and Acting Heads of Executive Departments and Agencies: Guidance for Regulatory Review," Office of Management and Budget, Executive Office of the President, March 4, 2009, M-09-13. Available at: http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-13.pdf.

[7] L. Heinzerling, "Inside EPA: A Former Insider's Reflections on the Relationship between the Obama EPA and the Obama White House", Pace Environmental Law Review, 2014. Available at: http://digitalcommons.pace.edu/pelr/vol31/iss1/5/.

Executive Order 12866 also requires the agency that submitted a rule to identify to the public, "in plain understandable language," the substantive changes between the draft action the agency submitted for review and the action subsequently announced after OIRA review. Further, it requires the agency to identify to the public the changes made *at the suggestion or recommendation of OIRA*.

But neither the timeliness nor the transparency required by the Executive Order is occurring.

Timeliness: Formal Review Deadlines

A December 2013 report prepared for the Administrative Conference of the United States[8] (ACUS) assessed the timeliness of OIRA's review of federal agency regulations from 1981 to mid-2013. The report found a dramatic increase in the average length of time of OIRA's regulatory reviews in 2012, growing from 55 days to 79 days. In the first half of 2013, the average review time increased to 140 days. The number of rules that exceeded OIRA's standard 90-day review limit nearly doubled, from 68 in 2010 to 133 in 2012. It had reached 93 in the first half of 2013, although in the third quarter of 2013, the number of overdue rules fell.

As of the end of February 2014, 51 rules pending at OIRA had exceeded the 90-day review period, including seven "economically significant" rules. Forty-three of these rules have been pending for more than 120 days. These extensive delays may be related to the sheer number of rules, notices, and guidance documents that OIRA now considers to be under its purview. In recent years, OIRA has typically undertaken reviews for 600-700 rules considered either "economically significant" or deemed significant for other reasons, such as raising "novel legal or policy issues" or causing "a serious inconsistency or otherwise interfere with an action taken or planned by another agency."

Delayed rules have real world impacts. One of the delayed proposed rules would provide the Food and Drug Administration (FDA) with the authority to regulate tobacco products, including hookah, electronic cigarettes, cigars, pipe tobacco, other novel tobacco products, and future tobacco products (under the Federal Food, Drug, and Cosmetic Act, as amended by the Family Smoking Prevention and Tobacco Control Act.)[9] Tobacco products contribute to over 400,000 deaths each year and are responsible for chronic illnesses in approximately 8.6 million Americans.[10]

Another final rule delayed beyond the 120-day review limit would give the Mine Safety and Health Administration (MSHA) authority to reduce coal miners' exposure to coal dust. The rule

[8] Curtis W. Copeland, Length of Rule Reviews by the Office of Information and Regulatory Affairs, Prepared for the Administrative Conference of the United States, December 2, 2013.
[9] Family Smoking Prevention and Tobacco Control Act, PL111-31, http://www.gpo.gov/fdsys/pkg/PLAW-111publ31/pdf/PLAW-111publ31.pdf.
[10] Ibid, Sec. 2(13)

has been under OIRA review since August 2013 and is considered an important element in MSHA's Comprehensive Black Lung Reduction Strategy to "End Black Lung Now."[11] Over the period of 1998-2007, more than 10,000 miners died from black lung disease, and the prevalence of black lung cases has more than doubled since the mid-1990s.[12]

These examples of delayed rules would impose stricter controls over products and processes in which the health impacts are widely known. But U.S. scientists and businesses continue to experiment with new commercial processes and to create new materials, and our failure to regulate new products may be even more disturbing. For example, nanoscale materials have become increasingly pervasive in our society, utilized not only in medical and technological applications but extensively in consumer products.[13]

An expanding body of scientific literature indicates potentially significant health risks are associated with the nanoscale materials that are in current use. The Environmental Protection Agency (EPA) submitted a proposed rule to OIRA in November 2010, *more than three years ago*, that would allow it to require manufacturers of certain nanoscale materials to provide EPA with exposure and release information, as well as available health and safety data related to these materials. This information is critical to EPA's ability to evaluate the safety of these products and proactively work to mitigate and/or minimize risks to human health or the environment.

But instead of investigating the potential risks of emerging technologies and new materials, OIRA has forced agencies to engage significant amounts of their time in "regulatory look backs." Although identifying and removing outdated and inefficient regulations is sensible in theory, in practice, the savings to the economy from retrospective reviews conducted by executive agencies have been relatively modest at best (Administrator Shelanski has estimated $10 billion[14]), and the opportunity costs to the agency and to public health unmeasured.

The budgets of federal regulatory agencies are under pressure and over the past decade, most have barely held even.[15] For example, OSHA's enforcement budget today is at the level it was in 1981 even though the number of workplaces it is supposed to oversee has doubled. Funding in recent years for the EPA's compliance and enforcement efforts, which support the majority of inspections and enforcement to ensure compliance with major environmental laws, have been at historical low levels.

And with new risks from nanoscale materials and new chemicals and industrial processes emerging, the time regulatory agencies are forced to spend looking back reduces the time they

[11] http://www.reginfo.gov/public/do/eAgendaViewRule?pubId=201310&RIN=1219-AB64.
[12] http://blogs.cdc.gov/niosh-science-blog/2008/08/18/mining/.
[13] See for example The Project on Emerging Nanotechnologies Consumer Products Inventory, which currently lists 1854 consumer products that contain nanomaterials, http://www.nanotechproject.org/cpi/products/.
[14] http://judiciary.house.gov/_files/hearings/113th/09302013/Shelanski%20testimony.pdf.
[15] "Public Protections Budget Dashboard – FY 15," Center for Effective Government.

have available to complete the rulemakings already underway and to identify and investigate new risks to public health. The time required for regulatory look backs probably contributes to agency delays in completing rules.

Recommendations for Reducing Delay

Recommendation: OIRA should not be allowed to exceed the 90/120-day deadline. ***Once a rule has been formally submitted for OIRA review, a failure to meet the 90/120 deadline should be considered "default approval" of the rule.*** Agencies would be allowed to issue the proposed or final rule under this scenario. Delaying the ability of agencies to issue crucial standards and safeguards by ignoring the executive order review deadlines is inconsistent with the executive order's mandate that the process "reaffirm the primacy of Federal agencies in the regulatory decision-making process." This is not acceptable.[16] ***If the first recommendation is not followed, and rules continue to be delayed at OIRA beyond the 120-day limit, then the public should be able to petition the agency responsible for the proposed or final rule to publish the rule.***

Recommendation: E.O. 12866 provides OIRA with discretion in determining which rules qualify as significant, and OIRA's expansive definition of "significant" rules, as well as the inclusion of guidance documents and pre-rulemaking actions, has resulted in an unwieldy and inappropriately broad portfolio. Additionally, the economic threshold of $100 million for defining "economically significant" rules was established in 1978 and has not been updated since. ***Congress should stipulate that OIRA may not review agency guidance documents, pre-rulemaking actions, or rules that are not economically significant. The economic threshold for defining "economically significant" rules should be adjusted to a level equivalent to the ratio with nation's gross national product in 1978, which in today's terms is $660 million.***

Recommendation: Regulatory "look backs" require significant amounts of staff time, effort, and resources. ***Since the primary mission of regulatory agencies is to evaluate and protect against potential risks to the American people, the economy, and the environment, agencies should not be forced to engage in resource intensive backward exercises in paring back outdated rules when they need to be scanning the future for emerging threats.*** The recent string of incidents that have put community and worker health at risk – in West Virginia, West, Texas, North Carolina, California, and more – demonstrate the need to focus on more immediate issues. With an aging physical infrastructure and declining enforcement staff, these kinds of incidents are likely to become more common.

[16] OIRA apparently interprets the extension provision in Section 6(b)(2)(C) of E.O.12866 to mean that agency-initiated requests can be of an unlimited duration, yet has never provided formal justification for this interpretation, which is inconsistent with the plain reading of the E.O. 12866 language that "the review process may be extended once by no more than 30 calendar days". The ACUS report includes accounts from numerous senior agency officials who reported that agency requests for extensions of review were actually made because OIRA suggested they do so.

Failures of Transparency: Informal Reviews and Substantive Changes

OIRA's public database only reflects the amount of time that the rules are under *formal review*. But the ACUS report and the article by Heinzerling previously referenced document how staff at OIRA review proposed rules *informally* prior to the rules being submitted to the formal review process. Interviews with senior agency employees conducted for the ACUS report indicate that many rules are informally reviewed for weeks or months prior to formal submission. At least some agencies have had to obtain permission from OIRA to submit their rules for formal review, and that some rules were not logged into the OIRA database until well after they were submitted by the agency. The informal reviews are typically not included in the agency rulemaking dockets, so it is impossible to verify whether informal reviews occurred or determine how long they lasted.

And of course, this informal review process completely undermines the public's ability to understand how and when and where OIRA inserted itself into the substance of the rulemaking and how rules changed as a result. OIRA has long operated as a "black box" in the rulemaking process; informal review enlarges the box.

The pattern is for rules to emerge from the OIRA review process significantly changed, almost always with weaker public protections or lower health and environmental standards. The reasons for these changes are almost never revealed – even though current policy (E.O. 12866) requires agencies to disclose "those changes in the regulatory action that were made at the suggestion or recommendation of OIRA."

OIRA has interpreted this provision to require disclosure of the changes suggested or recommended by OIRA during *formal* review. OIRA's interpretation of the disclosure requirements means that discussions regarding substantive changes to rules made during the *informal* review process remain completely hidden from the public. Interagency planning and consultation are supposed to be part of the federal government's deliberative process, so OIRA has plenty of opportunity to make its views known, but the extensive use of informal reviews and demands for more cost-benefit analyses and new studies before rules are allowed to move forward – outside of the public scrutiny of the formal review process – violates the spirit of the executive order.

Even when a rule is undergoing formal review, OIRA and agencies typically withhold communications or edits that occur. Unless an agency chooses to disclose its dealings with OIRA in an online rulemaking docket, it is nearly impossible for the public to determine what impact OIRA had on the rule. The public has to wait until the rulemaking process is completed to determine what changes were recommended by OIRA or other agencies.

While OIRA is required to reveal all communications between its staff and non-executive branch personnel during rule reviews, including "the subject matter discussed during such communications," this doesn't happen, either. OIRA's disclosure of such meetings with non-

executive branch government personnel and outside groups is limited to the name of the rule under review, the name and affiliation of the persons attending the meeting, and any meeting materials provided to OMB by the meeting participants. There is no public record of the "subject matter" discussed during these meetings, so the public is unable to discern the potential influence of outside groups on OIRA's rule reviews.

Recommendation: ***OIRA should be required to provide copies of the pre- and post-review versions of the rule in the rulemaking docket; a description in clear and simple language of the all substantive changes made to the rule by OIRA during both informal and formal review, as well as any changes made by an entity of the Executive Office of the President, by an agency not responsible for the rule, or by an individual not employed by the executive branch.***

OIRA should also be required to provide a summary of the subject matter discussed in meetings with non-executive branch government personnel and outside groups and to post these summaries together with the current meeting materials on its website.

Regulation to Assist Small Businesses and Family Farms and Promote Competitive Markets

Small business owners are also parents, homeowners, consumers, and concerned neighbors who want their families protected from environmental contamination, contaminated foods, and unsafe toys, just like other citizens. So it should not be surprising that public opinion research shows their views on a host of regulations mirror those of their fellow citizens. In fact, research shows more small business owners support energy and climate legislation than oppose it, and many believe such legislation would aid their businesses.[17] One poll found 86 percent of small business owners believe "some government regulations are necessary for a modern economy," and 78 percent believe "regulations are important to level the playing field with big business."[18] They report that inadequate demand and uncertainty about overall economic trends are their biggest problems – not regulations.

Unfortunately, trade associations and corporate lobbyists often cloak their anti-regulatory arguments in discussions of the purported "burdens" they would impose on small businesses (which I am defining as the 4.5-4.7 million employers with under 50 workers;[19] some would use an even lower number). We too are concerned about small businesses and family farmers but believe the real problems they face have more to do with industry consolidation and unfair competition from large producers, not from health and safety standards. Small retailers face an

[17] Small Business Majority, Opinion Survey: Small Business Owners Believe National Standards Supporting Energy Innovation Will Increase Prosperity for Small Firms, http://www.smallbusinessmajority.org/energy/pdfs/Clean_Energy_Report_092011.pdf (accessed June 3, 2011).
[18] Opinion Survey: Small Business Owners' Opinions on Regulations and Job Creation, February 1, 2012 http://asbcouncil.org/sites/default/files/files/Regulations_Poll_Report_FINAL.pdf.
[19] http://www.census.gov/epcd/www/smallbus.html.

uphill struggle to compete against big box chains that has to do with economies of scale and market power.

We urge Congress and regulators to reinvigorate antitrust and competition policy. Agribusiness monopolies are particularly damaging. Oligopolistic control over seed markets squeeze farmer costs and threaten biodiversity.[20] Small livestock and poultry farmers are increasingly unable to sell to competitive markets and instead work as *de facto* contract workers for giant packers and processors.[21]

While some regulations could create issues for small businesses (the expense of wheelchair access under the Americans for Disabilities Act), most include exemptions in such situations. The Small Business Administration had dedicated funds to provide regulatory compliance assistance to small enterprises, but currently they are only required to answer inquiries and provide compliance guides. Congress might ask them to be more proactive.

The Small Business Regulatory Enforcement Fairness Act could be amended to require agencies to conduct more outreach, education, and compliance assistance to small businesses. Many agencies already have existing Small Business Ombudsman offices specifically created to help small businesses with compliance issues once regulations are issued.[22] But legislation could encourage (and fund) these offices to proactive reach out to and educate small businesses about how they can comply with existing rules more efficiently. With a proactive approach, real small businesses would receive direct and tangible assistance to help them comply with regulations and allow the benefits that public health and safety regulations to be preserved.

Conclusion

In the United States' system of "checks and balances," Congress passes the laws and the executive branch executes them. In a perfect world, the lag time between the first and second would be short, so that a president who signs a piece of legislation would also be responsible for its implementation. In the real world, one Congress creates new regulatory authority and it is likely that a very different Congress and/or president will oversee the rules that implement that law. This time lag creates the space for all manner of mischief.

Government scientists and career civil servants have the scientific and technical expertise and regulatory experience to develop the rules that protect public health and safety *while* balancing a myriad of competing economic and political interests. Regulated industries should weigh in, and

[20] W. Hauter, Foodopoly: The Battle Over the Future of Food and Farming in America. New York: New Press, 2012.
[21] C. Leonard, The Meat Racket: The Secret Takeover of America's Food Business, New York: Simon & Schuster, 2014.
[22] A list of small business ombudsman offices can be found at http://www.sba.gov/category/navigation-structure/starting-managing-business/starting-business/business-law-regulations/contact-government-agency/fe.

do. Public interest groups, citizens, and communities hurt by the absence of effective regulation should also be heard but rarely have the time and resources to devote to a process that plays itself behind closed doors over years. Rulemaking is a balancing act. In a democracy, it should be done in public, not in secret.

Citizens have a right to know the individuals, lobbyists, associations, and companies that influence the standards and safeguards on which our quality of life is built. We have many successes to celebrate in our regulatory history – cleaner air, purer water, safer drugs. But our rulemaking system needs reform.

OIRA needs to meet its required review deadlines or trust agency expertise and let the rules stand. It needs to stop "gaming" the executive order by engaging in off-the-record early, informal reviews and putting pressure on scientists and content experts. It needs to be transparent with the public about the groups and individuals with whom it consults and gathers information. And OIRA needs to help increasingly resource-constrained regulatory agencies focus on immediate public health and environmental issues and emerging challenges of the future instead of requiring them to use precious resources looking backward.

United States Government Accountability Office

GAO

Testimony before the Subcommittee on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce, Committee on Homeland Security and Governmental Affairs, U.S. Senate

For Release on Delivery
Expected at 2:30 p.m. EDT
Tuesday, March 11, 2014

FEDERAL RULEMAKING

Regulatory Review Processes Could Be Enhanced

Statement of Michelle Sager, Director, Strategic Issues

March 11, 2014

GAO Highlights

Highlights of GAO-14-423T, a testimony before the Subcommittee on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce, Committee on Homeland Security and Governmental Affairs, U.S. Senate

FEDERAL RULEMAKING

Regulatory Review Processes Could Be Enhanced

Why GAO Did This Study

Federal regulation is a basic tool of government. Agencies issue thousands of regulations each year to achieve public policy goals such as ensuring that workplaces, air travel, foods, and drugs are safe; that the nation's air, water and land are not polluted; and that the appropriate amount of taxes is collected. Congresses and Presidents have taken a number of actions to refine and reform the regulatory process over the last several decades. Among the goals of such initiatives are enhancing oversight of rulemaking by Congress and the President, promoting greater transparency and participation in the process, and reducing regulatory burdens on affected parties.

Over the past two decades Congress has often asked GAO to evaluate the implementation of procedural and analytical requirements that apply to the rulemaking process. The importance of improving the transparency of the rulemaking process emerged as a common theme throughout GAO's body of work. Based on that body of work, this testimony addresses (1) GAO's findings and recommendations regarding federal agencies' retrospective reviews, (2) GAO's findings and OIRA's progress to date on GAO recommendations to improve the transparency of the regulatory review process, and (3) other opportunities for increasing congressional oversight and public participation in the rulemaking process.

GAO is not making recommendations in this testimony.

View GAO-14-423T. For more information, contact Michelle Sager, 202-512-6806 or sagerm@gao.gov.

What GAO Found

In 2007, GAO found that agencies had conducted more retrospective reviews of the costs and benefits of existing regulation than was readily apparent, especially to the public. Requirements in statutes or executive directives were sometimes the impetus for reviews, but agencies more often conducted these retrospective reviews based on their own discretionary authorities. Agencies reported that discretionary reviews more often generated actions, such as amending regulations or changes to guidance. GAO also found that multiple factors, such as data limitations and lack of transparency, impeded agencies' reviews. GAO made 7 recommendations in 2007 to improve the effectiveness and transparency of retrospective regulatory reviews. Among GAO's recommendations were: minimum standards for documenting and reporting completed review results; including public input as a factor in regulatory review decisions; and consideration of how agencies will measure the performance of new regulations. In 2011 and 2012, the administration issued new directives to agencies on how they should plan and conduct analyses of existing regulations that addressed each of GAO's recommendations.

By executive order, the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) reviews draft proposed and final rules from executive agencies, other than independent regulatory agencies. Among the purposes of these reviews are ensuring that regulations are consistent with applicable law and the President's priorities and that decisions made by one agency do not conflict with the policies or actions taken or planned by another. Both OIRA and executive agencies are also required to disclose certain information about the review process. In 2003 and 2009, GAO found that the OIRA regulatory review process often resulted in changes to agencies' rules, but the transparency and documentation of the review process could be improved. GAO made 12 recommendations to OMB about the review process. For example, GAO recommended that OMB provide guidance to agencies regarding documentation of the reasons for an agency's withdrawal of a draft rule from OIRA review and the source or impetus of changes made to rules. OMB to date has implemented only 1 of those 12 recommendations—to clarify information posted about the topic and participants in meetings with outside parties on rules under review. GAO believes that its past recommendations still have merit and would improve the transparency of the OIRA review process.

GAO's recent work continues to highlight progress in facilitating transparency and public participation as well as room for improvement. In 2012, GAO found that agencies often requested comments when issuing major rules without a notice of proposed rulemaking but missed an opportunity to improve those rules because they did not always respond to the comments. GAO's 2013 review of international regulatory cooperation also found opportunities to better facilitate public participation in these activities. GAO also found that effective international regulatory cooperation requires interagency coordination and effective collaboration with federal agency officials' foreign counterparts. Agency officials stated that they cooperate with their foreign counterparts (1) because they are operating in an increasingly global environment and many products that agencies regulate originate overseas and (2) in an effort to gain efficiencies—for example, by sharing resources or avoiding duplicative work.

Chairman Tester, Ranking Member Portman, and Members of the Subcommittee:

I am pleased to be here today to discuss the federal rulemaking process, focusing in particular, at your request, on agencies' efforts to retrospectively review their existing rules[1] and the regulatory review process coordinated through the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA).

Federal regulation is a basic tool of government. Agencies issue thousands of regulations each year to achieve public policy goals such as ensuring that workplaces, air travel, food, and drugs are safe; that the nation's air, water, and land are not polluted; and that the appropriate amount of taxes is collected. Congresses and Presidents have taken a number of actions to refine and reform the regulatory process over the past 30 years. Among the goals of such initiatives are enhancing oversight of rulemaking by Congress and the President, promoting greater transparency and participation in the process, and reducing regulatory burdens on affected parties. OIRA is a key player in the regulatory process with its responsibility for ensuring that regulations are consistent with applicable law, the President's priorities, and the principles set forth in executive orders, among other things.

During the past two decades Congress has often asked GAO to evaluate the implementation of procedural and analytical requirements that apply to the rulemaking process.[2] Drawing on that body of work, my remarks today will specifically summarize (1) our findings and recommendations regarding federal agencies' retrospective regulatory reviews, (2) our

[1]There is no one standard definition for the variety of activities that might be considered retrospective regulatory reviews. For purposes of this statement, the term retrospective review generally means any assessment of an existing regulation, for purposes of determining whether (1) the expected outcomes of the regulation have been achieved; (2) the agency should retain, amend, or rescind the regulation; and/or (3) the actual benefits and costs of the implemented regulation correspond with estimates prepared at the time the regulation was issued.

[2]Under the Congressional Review Act, we also provide the Congress with a report on each major rule containing our assessment of whether the promulgating federal agency's submissions to us indicate that it has complied with the procedural steps required by various acts and Executive Orders governing the regulatory process. A major rule is one that, among other things, has resulted in or is likely to result in an annual effect on the economy of $100 million or more.

findings and OIRA's progress to date on our recommendations to improve the transparency of the regulatory review process, and (3) other opportunities our work has identified for increasing congressional oversight and public participation in the rulemaking process.

My testimony today is primarily based on prior reports and testimonies on the rulemaking process prepared at the request of Congress.[3] We have updated some of the references in this statement to reflect more recent executive orders and related OMB guidance. We used multiple methodologies to develop the findings, conclusions, and recommendations for these prior products. A more detailed discussion of prior reports' objectives, scope, and methodology, including our assessment of data reliability, is available in the reports cited in the related products list at the end of this statement. The work upon which this testimony is based was conducted in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

In brief, the importance of improving the transparency of the rulemaking process emerged as a common theme throughout our prior body of work. In 2007, we found that agencies were conducting many more retrospective reviews of their existing regulations than was readily apparent to non-federal parties, and documentation and reporting on results of those reviews was often lacking. In a series of products from 1996 through 2009 examining implementation of the OIRA regulatory review process, we consistently found that OIRA's reviews of agencies' draft rules often resulted in changes, but the transparency and documentation of the review process could be improved. However, OIRA only implemented 1 of our 12 most recent recommendations on this OIRA regulatory review process. Our recent work has continued to highlight both progress made in facilitating transparency, oversight, and public participation in regulatory actions as well as room for improvement.

[3]A selected list of related GAO products is included at the end of this statement.

Executive Orders and OMB Guidance Addressed Our Prior Recommendations to Improve Effectiveness and Transparency of Retrospective Reviews

In 2007, we evaluated retrospective review activities conducted between 2001 and 2006 by nine agencies covering health, safety, environmental, financial, and economic regulations.[4] Agencies reported that the main purpose of most of their reviews was to examine the effectiveness of the implementation of regulations. We found that the agencies had conducted more retrospective reviews, and a greater variety of these reviews (such as ones examining the efficiency and effectiveness of regulations and others identifying opportunities to reduce regulatory burdens) than was readily apparent, especially to the public. Reviews mandated by requirements in statutes or executive orders and related OMB memorandums were sometimes the impetus for reviews, but agencies more often exercised their own discretionary authorities to review regulations. As a result of these reviews, agencies amended regulations, changed guidance and related documents, decided to conduct additional studies, and confirmed that existing rules achieved the intended results. Agencies noted that discretionary reviews generated additional action more often than mandatory reviews, which most often resulted in no changes.

We also found that agencies, to varying extents, were developing written procedures, processes, and standards to guide how they select which rules to review, analyze those rules, and report the results. Multiple factors helped or impeded the conduct and usefulness of retrospective reviews. Agencies identified time and resources as the most critical barriers, but also cited factors such as data limitations and overlapping or duplicative review requirements. Nonfederal parties also identified a lack of transparency in agency review processes as a barrier and said they were rarely aware of the agencies' reviews. We made seven recommendations for executive action in the 2007 report to improve the effectiveness and transparency of retrospective regulatory reviews.[5] Among the elements that we recommended incorporating in policies, procedures, or guidance were: minimum standards for documenting and reporting completed review results; inclusion of public input as a factor in regulatory review decisions; and consideration of how agencies will measure the performance of new regulations.

[4]GAO, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-791 (Washington, D.C.: July 16, 2007).

[5]Appendix I lists the relevant recommendations from our prior reports and indicates whether or not each recommendation has been implemented.

OMB took actions that addressed our recommendations which, if effectively implemented, will improve the transparency, credibility, and effectiveness of agencies' retrospective review efforts. For example, in 2011 and 2012, the administration issued new directives to agencies on how they should plan and conduct analyses of existing regulations, among other subjects, that addressed each of our prior recommendations.[6] Collectively, they directed executive agencies and encouraged independent regulatory agencies to develop and implement plans to periodically review existing significant regulations.[7] OMB's guidance on the 2011 and 2012 executive orders advised agencies to identify in their final plans specific reforms and initiatives that will significantly reduce existing regulatory burdens and promote economic growth and job creation.

We are currently completing a report at the request of Senators Ron Johnson and Mark Warner concerning agencies' retrospective regulatory analyses under the 2011 and 2012 executive orders. The report will identify for selected agencies (1) the results and anticipated outcomes of completed retrospective analyses included in agencies' review plans and progress reports, (2) strategies, practices, or factors that facilitated or limited agencies' ability to implement retrospective analyses, and (3) the extent to which agencies are incorporating retrospective analyses into their processes for measuring and achieving agency priority goals.

[6]These directives included Executive Orders 13563, 13579, and 13610, along with related OMB memoranda. The three executive orders were published at 76 Fed. Reg. 3821 (Jan. 21, 2011), 76 Fed. Reg. 41,587 (July 14, 2011), and 77 Fed. Reg. 28,469 (May 14, 2012). We also addressed these recommendations to the Chief Counsel for Advocacy within the Small Business Administration, to enhance guidance that the Office of Advocacy provides to agencies on compliance with retrospective reviews conducted under the Regulatory Flexibility Act. (See 5 U.S.C. § 610.) The Office of Advocacy also took actions to implement each of our recommendations.

[7]Executive Order 12866 defines significant regulatory actions as those that are likely to result in a rule that may: (1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866.The order further directs executive branch agencies to conduct and submit to OIRA a regulatory analysis for economically significant regulations (those rules under the first item in the definition above).

Aspects of the OIRA Regulatory Review Process Could Be More Transparent

In a series of products from 1996 through 2009 examining implementation of the OIRA regulatory review process, we consistently found that OIRA's reviews of agencies' draft rules often resulted in changes, but the transparency and documentation of the review process could be improved. Unfortunately, as I will detail below, to date, OIRA has implemented only 1 of our 12 most recent recommendations on this process.

A brief explanation of OIRA's review process provides helpful context for understanding why these findings and recommendations remain relevant today. Centralized presidential reviews of agency's regulations have a long history and can be traced back to a program established by President Nixon in 1971. President Reagan's Executive Order 12291 in 1981 expanded the scope of presidential reviews of rulemakings and delegated responsibility for this review function to OIRA.[8] President Clinton's issuance of Executive Order 12866 in 1993 established the current process and requirements regarding reviews of covered agencies' draft proposed and final rules. More recently, in 2011, President Obama issued Executive Order 13563, which supplemented and reaffirmed the principles, structures, and definitions governing contemporary regulatory review established in the 1993 executive order. The basic procedures and requirements for the regulatory review process today follow the provisions of that 1993 executive order. This practice of centralized regulatory reviews is now well established as part of the rulemaking process, although it continues to attract some controversy and criticism.

In essence, OIRA is responsible for the coordinated review of agencies' draft proposed and final rules to ensure that regulations are consistent with applicable law, the President's priorities, and the principles set forth in executive orders. OIRA is also to ensure that decisions made by one agency do not conflict with the policies or actions taken or planned by another agency. Executive agencies, except for independent regulatory agencies, are required to submit their significant regulatory actions to OIRA for review. OIRA is generally required to complete its review within

[8]OIRA was created within OMB as part of the Paperwork Reduction Act of 1980. 44 U.S.C. 3503.

90 days after an agency formally submits a draft regulation.[9] The review process can be summarized as follows:

- OIRA reviews agencies' draft rules at both the proposed and final stages of rulemaking. In each phase, the rulemaking agency submits a regulatory review package to OIRA (consisting of the rule, any supporting materials, and a transmittal form) and OIRA initiates a review.
- During the review process, OIRA analyzes the draft rule in light of executive order principles and discusses the package with staff and officials at the rulemaking agency, as well as with other agencies with which interagency coordination will be necessary. In the course of that process, the draft rule that is submitted by the agency often changes. In some cases, agencies withdraw the draft rule from OIRA during the review period and the rule may or may not be subsequently resubmitted to OIRA.
- At the end of the review period, OIRA either concludes that the draft rule is consistent with the principles of the executive order (which occurs in the vast majority of cases) or returns the rule to the agency "for further consideration."[10]
- If a draft rule that was determined to be consistent with the executive order has been modified in the course of the review, the rule is coded in the OIRA database as "consistent with change" (regardless of the source or extent of the change). If no changes have been made to the draft rule during the review, the rule is coded as "consistent without change." OIRA only codes rules as "consistent without change" if they are exactly the same at the end of the review period as the original submission. Even editorial changes made at the rulemaking agency's initiative can cause a rule to be coded "consistent with change."

[9]The order provides that the review process may be extended (1) once by no more than 30 calendar days upon the written approval of the Director of OMB and (2) at the request of the agency head.

[10]Information about regulatory actions under OIRA review, and the outcomes of reviews, is available through http://www.reginfo.gov.

Executive Order 12866 also contains several transparency provisions that require both OIRA and agencies to disclose certain information about the OIRA review process. For example, the order requires OIRA to disclose information about communications between OIRA and persons not employed by the executive branch pertinent to rules under OIRA's review and, if OIRA returns a rule to the issuing agency for reconsideration, the executive order requires OIRA to provide a written explanation for the return. If a rule is withdrawn from OIRA review, however, the order has no requirement for OIRA or the regulatory agency to provide a written explanation. After the rule has been published in the *Federal Register* or otherwise issued to the public, the regulatory agency publishing the rule is required to

- make available to the public the information provided to OIRA in accordance with the executive order;
- identify for the public, in a complete, clear, and simple manner, the substantive changes between the draft submitted to OIRA and the action subsequently announced; and
- identify for the public those changes in the regulatory action that were made at the suggestion or recommendation of OIRA.

These transparency requirements and documentation are not simply a matter of administrative paperwork. Agencies' documentation of the OIRA review process and its outcomes become part of the regulatory docket for each rulemaking.[11] The docket publicly documents the support and basis for decisions made about the substance of the rule, thus serving as a source of information for decision makers, the general public, and for purposes of potential judicial review.

Since the issuance of Executive Order 12866, Congress has periodically asked us to examine the implementation of the OIRA regulatory review process.[12] Multiple products we issued from 1996 through 2009

[11] A docket is a collection or repository of documents related to a rulemaking or other action.

[12] See, in particular, GAO, *Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews*, GAO-09-205 (Washington, D.C.: Apr. 20, 2009); *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929 (Washington, D.C.: Sept. 22, 2003); and *Regulatory Reform: Changes Made to Agencies' Rules Are Not Always Clearly Documented*, GAO/GGD-98-31 (Washington, D.C.: Jan. 8, 1998).

consistently found that the OIRA regulatory review process often resulted in changes to agencies' rules but the transparency and documentation of the review process could be improved. For example, in 2003, we examined 85 rules from nine health, safety, or environmental agencies that had been changed, returned or withdrawn as a result of the OIRA review process. We found that the OIRA review process had significantly affected 25 of those 85 rules. While almost all returned rules were from the Department of Transportation, the rules that were most often significantly changed were from the Environmental Protection Agency. OIRA's suggestions appeared to have at least some effect on almost all of the 25 rules' potential costs and benefits or the agencies' estimates of those costs and benefits. The agencies' docket files did not always provide clear and complete documentation of the changes made during OIRA's review or at OIRA's suggestion, as required by the executive order, though a few agencies exhibited exemplary transparency practices.

In 2009, we again found that OIRA's reviews of agencies' draft rules often resulted in changes. Of our 12 case-study rules subject to OIRA review, 10 reviews resulted in changes, about half of which included changes to the regulatory text. Agencies used various methods to document OIRA's reviews and these methods generally met disclosure requirements. However, we found that agencies could improve the transparency of this documentation. In particular, agencies did not always clearly attribute changes made at the suggestion of OIRA. Additionally, agencies' interpretations were not necessarily consistent regarding what constitutes a substantive change that should be documented to comply with the executive order transparency requirements. Both of these issues had been identified in our earlier work.[13]

In our 2003 and 2009 reports, we made a total of 12 recommendations to OMB about the review process under Executive Order 12866 (see appendix I for a list of the recommendations). In 2003 we made 8 recommendations targeting several aspects of the OIRA review process that remained unclear and where improvements could allow the public to better understand the effects of OIRA's review. For example, these aspects included addressing a lack of documentation requirements regarding (1) staff-level exchanges during the review process, (2) the reasons for withdrawal of a rule, or (3) the source or impetus of changes

[13]See GAO-03-929 and GAO/GGD-98-31.

made to rules. In 2009, based on similar findings, we made 4 additional recommendations that OMB provide guidance to agencies to improve transparency and documentation of the OIRA review process. OMB generally agreed with the 4 recommendations in our 2009 report, but disagreed with 7 of the 8 recommendations in our 2003 report.

OIRA to date has implemented only 1 of those 12 recommendations—to more clearly indicate in the posted information which regulatory action was being discussed and the affiliations of participants when meeting with outside parties regarding draft rules under OIRA review. We believe that our past recommendations still have merit and, if acted upon, would improve the transparency of the OIRA review process. For example, regarding our recommendation that the Administrator of OIRA should establish procedures whereby either OIRA or the agencies disclose the reasons why rules are withdrawn from OIRA review, we note that OIRA's records on the outcomes of regulatory reviews indicate many more withdrawals, which currently require no explanation, than returns, which do require explanations.

Importantly, other organizations have raised concerns about the timeliness of OIRA regulatory reviews. In particular, the Administrative Conference of the United States (ACUS) issued a report and adopted a statement in December 2013 on improving the timeliness of OIRA's regulatory review process.[14] ACUS noted an increase in average review times since 2011, including many reviews that extended well past the limits established in Executive Order 12866, while also acknowledging that OIRA had recently made progress in addressing the backlog. ACUS offered a set of principles for improving the timeliness of review and the transparency concerning the causes for delays, such as that OIRA should, whenever possible, adhere to the timeliness provisions of Executive Order 12866 and, if unable to complete the review of an agency's draft rule within a reasonable time—but in no event beyond 180 days after submission—should inform the public as to the reasons for the delay or return the rule to the submitting agency.

[14] See Administrative Conference Statement #18, *Improving the Timeliness of OIRA Regulatory Review,* adopted December 6, 2013. ACUS is an independent agency in the executive branch, established as an advisory agency in administrative law and procedure. ACUS has broad authority to conduct studies and make recommendations for improving the efficiency, adequacy, and fairness of the procedures agencies use in carrying out administrative programs.

Additional Opportunities Exist to Facilitate Congressional Oversight and Public Participation in the Rulemaking Process

Our recent work has continued to highlight both progress made in facilitating transparency, oversight, and public participation in regulatory actions as well as room for improvement. Improvements made in transparency of the rulemaking process benefit not only the public but also congressional oversight. In 2012, we reviewed a generalizable random sample of 1,338 final rules published during calendar years 2003 through 2010 to provide information on the frequency, reasons for, and potential effects of agencies issuing final rules without a notice of proposed rulemaking (NPRM). Before issuing a final rule, agencies are generally required to publish an NPRM in the *Federal Register*. Agencies must then respond to public comments when issuing final rules. However, agencies may use exceptions in certain circumstances to forgo this NPRM process to expedite rulemaking. For example, agencies may use the good cause exception when they find that notice and comment procedures are "impracticable, unnecessary, or contrary to the public interest." We found that agencies frequently cited the good cause exception and other statutory exceptions to publish final rules without NPRMs. Agencies did not publish an NPRM for about 35 percent of major rules and about 44 percent of nonmajor rules published from 2003 through 2010.[15]

We found that agencies, though not required, often requested comments on major final rules issued without an NPRM, but they did not always respond to the comments received.[16] For example, we found that agencies requested comments on 77 of the 123 major rules issued without an NPRM in our sample. The agencies did not issue a follow-up rule or respond to comments on 26 of these 77. This is a missed opportunity, because we found that, when agencies did respond to public comments, they often made changes to improve the rules. Each of these 26 rules is economically significant and some of these rules have an effect of one billion dollars a year or more. To better balance the benefits of expedited rulemaking procedures with the benefits of public comments that are typically part of regular notice-and-comment rulemakings, and improve the quality and transparency of rulemaking records, we

[15]GAO, *Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments*, GAO-13-21 (Washington, D.C.: Dec. 20, 2012).

[16]Agencies may solicit comments through the *Federal Register* when publishing a final rule without an NPRM, but the public does not have an opportunity to comment before the rule's issuance, nor is the agency obligated to respond to comments it has received.

recommended that OMB, in consultation with ACUS, issue guidance to encourage agencies to respond to comments on final major rules, for which the agency has discretion, that are issued without a prior notice of proposed rulemaking. OMB stated that it did not believe it necessary to issue guidance on the topic at that time and has not, to date, taken any action to implement our recommendation. We continue to believe that the recommendation has merit and urge OMB to reconsider its prior position.

In our 2013 review of international regulatory cooperation we again found opportunities to better facilitate public participation in regulatory activities. In that report, we noted the growing importance of considering regulations in an international context.[17] Agency officials stated that they cooperate with their foreign counterparts (1) because they are operating in an increasingly global environment and many products that agencies regulate originate overseas and (2) in an effort to gain efficiencies—for example, by sharing resources or avoiding duplicative work.

Agencies' efforts to cooperate on regulatory programs may also facilitate trade and support the competitiveness of U.S. business. Agency officials we interviewed said that stakeholder involvement is important and nonfederal stakeholders are uniquely positioned to identify and call attention to unnecessary differences among U.S. regulations and those of its trading partners. However, stakeholders we spoke with, such as academics, organizations representing businesses, and consumer advocacy groups, said it can be challenging for them to provide input into agencies' international regulatory cooperation activities because of the required resources and the difficulty of becoming aware of such activities.

In addition to effective collaboration with affected nonfederal stakeholders, effective international regulatory cooperation requires interagency coordination and effective collaboration with federal agency officials' foreign counterparts. In an environment of constrained resources it is even more important for agencies to share knowledge on the effective implementation of international regulatory cooperation.

[17]GAO, *International Regulatory Cooperation: Agency Efforts Could Benefit from Increased Collaboration and Interagency Guidance*, GAO-13-588 (Washington, D.C.: Aug. 1, 2013).

We recommended that the Regulatory Working Group, a forum chaired by the OIRA Administrator to assist agencies in identifying and analyzing important regulatory issues, establish one or more mechanisms to facilitate staff level collaboration on international regulatory cooperation issues and include independent regulatory agencies. Such a mechanism could be addressed as part of forthcoming guidance on Executive Order 13609. This May 2012 executive order on promoting international regulatory cooperation was intended to provide high-level support and direction for U.S. agencies' international regulatory cooperation efforts. The executive order directed agencies to consider addressing unnecessary differences in existing regulations and describes processes to help avoid regulatory divergence in the future. If implemented, our recommendation regarding a staff level collaboration mechanism could help ensure that U.S. agencies have the necessary tools and guidance to effectively implement international regulatory cooperation.[18]

Chairman Tester, Ranking Member Portman, and Members of the Subcommittee, this concludes my prepared statement. Once again, I appreciate the opportunity to testify on these important issues. I would be pleased to address any questions you or other members of the subcommittee might have at this time.

[18]See GAO, *Managing for Results: Implementation Approaches Used to Enhance Collaboration in Interagency Groups.* GAO-14-220 (Washington, D.C.: Feb. 14, 2014); *Managing for Results: Key Considerations for Implementing Interagency Collaborative Mechanisms*, GAO-12-1022 (Washington, D.C.: Sep. 27, 2012); and *Results-Oriented Government: Practices that Can Help Enhance and Sustain Collaboration among Federal Agencies*, GAO-06-15 (Washington, D.C.: Oct. 21, 2005).

GAO Contact

If additional information is needed regarding this testimony, please contact Michelle Sager, Director, Strategic Issues, at (202) 512-6806 or sagerm@gao.gov.

Appendix I: Relevant GAO Recommendations on Regulatory Processes

Recommendation	Agency affected	Recommendation implemented[a]
Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews, GAO-03-929: Published: Sep. 22, 2003.		
The Director of the Office of Management and Budget should improve the implementation of the transparency requirements in the executive order that are applicable to rulemaking agencies. Specifically, the Administrator should instruct agencies to put information about changes made in a rule after submission for OIRA's review and those made at OIRA's suggestion or recommendation in the agencies' public rulemaking dockets, and to do so within a reasonable period after the rules have been published.	Executive Office of the President: Office of Management and Budget	
The Director of the Office of Management and Budget should improve the implementation of the transparency requirements in the executive order that are applicable to rulemaking agencies. Specifically, the Administrator should define the types of "substantive" changes during the OIRA review process that agencies should disclose as including not only changes made to the regulatory text but also other, noneditorial changes that could ultimately affect the rules' application (e.g., explanations supporting the choice of one alternative over another and solicitations of comments on the estimated benefits and costs of regulatory options).	Executive Office of the President: Office of Management and Budget	
The Director of the Office of Management and Budget should improve the implementation of the transparency requirements in the executive order that are applicable to OIRA. Specifically, the Administrator should establish procedures whereby either OIRA or the agencies disclose the reasons why rules are withdrawn from OIRA review.	Executive Office of the President: Office of Management and Budget	
The Director of the Office of Management and Budget should improve the implementation of the transparency requirements in the executive order that are applicable to OIRA. Specifically, OIRA should reexamine its current policy that only documents exchanged by OIRA branch chiefs and above need to be disclosed because most of the documents that are exchanged while rules are under review at OIRA are exchanged between agency staff and OIRA desk officers.	Executive Office of the President: Office of Management and Budget	
The Director of the Office of Management and Budget should improve the implementation of the transparency requirements in the executive order that are applicable to OIRA. Specifically, the Administrator should more clearly indicate in the meeting log which regulatory action was being discussed and the affiliations of the participants in those meetings.	Executive Office of the President: Office of Management and Budget	✓
The Director of the Office of Management and Budget should change OIRA's database to clearly differentiate within the "consistent with change" outcome category which rules were substantively changed at OIRA's suggestion or recommendation and which were changed in other ways and for other reasons.	Executive Office of the President: Office of Management and Budget	
The Director of the Office of Management and Budget should define the transparency requirements applicable to the agencies and OIRA in section 6 of Executive Order 12866 in such a way that they include not only the formal review period, but also the informal review period when OIRA says it can have its most important impact on agencies' rules. Doing so would make the trigger for the transparency requirements applicable to OIRA's and the agencies' interaction consistent with the trigger for the transparency requirements applicable to OIRA regarding its communications with outside parties.	Executive Office of the President: Office of Management and Budget	

Recommendation	Agency affected	Recommendation implemented[a]
The Director of the Office of Management and Budget should improve the implementation of the transparency requirements in the executive order that are applicable to rulemaking agencies. Specifically, the Administrator should encourage agencies to use "best practice" methods of documentation that clearly describe those changes (e.g., like those used by the Food and Drug Administration, the Environmental Protection Agency's Office of Water, or the Federal Motor Carriers Safety Administration).	Executive Office of the President: Office of Management and Budget	
Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews, GAO-07-791: Published July 16, 2007.		
The Director of the Office of Management and Budget, through the Administrator of the Office of Information and Regulatory Affairs (OIRA), and the Chief Counsel for Advocacy should develop guidance to regulatory agencies to consider or incorporate into their policies, procedures, or agency guidance documents that govern regulatory review activities consideration, during the promulgation of certain new rules, of whether and how they will measure the performance of the regulation, including how and when they will collect, analyze, and report the data needed to conduct a retrospective review. Such rules may include significant rules, regulations that the agencies know will be subject to mandatory review requirements, and any other regulations for which the agency believes retrospective reviews may be appropriate.	Executive Office of the President: Office of Management and Budget: Office of Information and Regulatory Affairs and the Small Business Administration: Office of Advocacy	✓
The Director of the Office of Management and Budget, through the Administrator of the Office of Information and Regulatory Affairs, and the Chief Counsel for Advocacy should develop guidance to regulatory agencies to consider or incorporate into their policies, procedures, or agency guidance documents that govern regulatory review activities prioritization of review activities based upon defined selection criteria. These criteria could take into account factors such as the impact of the rule; the length of time since its last review; whether changes to technology, science, or the market have affected the rule; and whether the agency has received substantial feedback regarding improvements to the rule, among other factors relevant to the particular mission of the agency.	Executive Office of the President: Office of Management and Budget: Office of Information and Regulatory Affairs and the Small Business Administration: Office of Advocacy	✓
The Director of the Office of Management and Budget, through the Administrator of the Office of Information and Regulatory Affairs, and the Chief Counsel for Advocacy should develop guidance to regulatory agencies to consider or incorporate into their policies, procedures, or agency guidance documents that govern regulatory review activities specific review factors to be applied to the conduct of agencies' analyses that include, but are not limited to, public input to regulatory review decisions.	Executive Office of the President: Office of Management and Budget: Office of Information and Regulatory Affairs and the Small Business Administration: Office of Advocacy	✓
The Director of the Office of Management and Budget, through the Administrator of the Office of Information and Regulatory Affairs, and the Chief Counsel for Advocacy should develop guidance to regulatory agencies to consider or incorporate into their policies, procedures, or agency guidance documents that govern regulatory review activities minimum standards for documenting and reporting all completed review results. For reviews that included analysis, these minimal standards should include making the analysis publicly available.	Executive Office of the President: Office of Management and Budget: Office of Information and Regulatory Affairs and the Small Business Administration: Office of Advocacy	✓

Recommendation	Agency affected	Recommendation implemented[a]
The Director of the Office of Management and Budget, through the Administrator of the Office of Information and Regulatory Affairs, and the Chief Counsel for Advocacy should develop guidance to regulatory agencies to consider or incorporate into their policies, procedures, or agency guidance documents that govern regulatory review activities mechanisms to assess their current means of communicating review results to the public and identify steps that could improve this communication. Such steps could include considering whether the agency could make better use of its agency Web site to communicate reviews and results, establishing an e-mail listserve that alerts interested parties about regulatory reviews and their results, or using other Web-based technologies (such as Web forums) to solicit input from stakeholders across the country.	Executive Office of the President: Office of Management and Budget: Office of Information and Regulatory Affairs and the Small Business: Office of Advocacy	✓
The Director of the Office of Management and Budget, through the Administrator of the Office of Information and Regulatory Affairs, and the Chief Counsel for Advocacy should develop guidance to regulatory agencies to consider or incorporate into their policies, procedures, or agency guidance documents that govern regulatory review activities steps to promote sustained management attention and support to help ensure progress in institutionalizing agency regulatory review initiatives.	Executive Office of the President: Office of Management and Budget: Office of Information and Regulatory Affairs and the Small Business: Office of Advocacy	✓
In light of overlapping and duplicative review factors in statutorily mandated reviews and the difficulties identified by agencies in their ability to conduct useful reviews with predetermined time frames, the Administrator of OIRA and Chief Counsel for Advocacy should work with regulatory agencies to identify opportunities for Congress to revise the timing and scope of existing regulatory review requirements and/or consolidate existing requirements.	Executive Office of the President: Office of Management and Budget: Office of Information and Regulatory Affairs and the Small Business: Office of Advocacy	✓
Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews, GAO-09-205: Published: Apr. 20, 2009.		
If the current administration retains Executive Order 12866, or establishes similar transparency requirements, to improve the monitoring and evaluation of rules development and the transparency of the review process, the Director of OMB, through the Administrator of OIRA, should define in guidance what types of changes made as a result of the OIRA review process are substantive and need to be publicly identified to more consistently implement the order's requirement to provide information to the public "in a complete, clear, and simple manner."	Executive Office of the President: Office of Management and Budget	
If the current administration retains Executive Order 12866, or establishes similar transparency requirements, to improve the monitoring and evaluation of rules development and the transparency of the review process, the Director of OMB, through the Administrator of OIRA, should direct agencies to clearly state in final rules whether they made substantive changes as a result of the OIRA reviews to more consistently implement the order's requirement to provide information to the public "in a complete, clear, and simple manner."	Executive Office of the President: Office of Management and Budget	
If the current administration retains Executive Order 12866, or establishes similar transparency requirements, to improve the monitoring and evaluation of rules development and the transparency of the review process, the Director of OMB, through the Administrator of OIRA, should standardize how agencies label documentation of these changes in public rulemaking dockets to more consistently implement the order's requirement to provide information to the public "in a complete, clear, and simple manner."	Executive Office of the President: Office of Management and Budget	

Recommendation	Agency affected	Recommendation implemented[a]
If the current administration retains Executive Order 12866, or establishes similar transparency requirements, to improve the monitoring and evaluation of rules development and the transparency of the review process, the Director of OMB, through the Administrator of OIRA, should instruct agencies to clearly attribute those changes "made at the suggestion or recommendation of OIRA to more consistently implement the order's requirement to provide information to the public "in a complete, clear, and simple manner."	Executive Office of the President: Office of Management and Budget	
Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments, GAO-13-21: Published: Dec. 20, 2012.		
To better balance the benefits of expedited rulemaking procedures with the benefits of public comments that are typically part of regular notice-and-comment rulemakings, and improve the quality and transparency of rulemaking records, the Director of OMB, in consultation with the Chairman of Administrative Conference of the United States (ACUS), should issue guidance to encourage agencies to respond to comments on final major rules, for which the agency has discretion, that are issued without a prior notice of proposed rulemaking.	Executive Office of the President: Office of Management and Budget	
International Regulatory Cooperation: Agency Efforts Could Benefit from Increased Collaboration and Interagency Guidance, GAO-13-588: Published: Aug. 1, 2013.		
To ensure that U.S. agencies have the necessary tools and guidance for effectively implementing international regulatory cooperation, the Regulatory Working Group, as part of forthcoming guidance on implementing Executive Order 13609, should establish one or more mechanisms, such as a forum or working group, to facilitate staff level collaboration on international regulatory cooperation issues and include independent regulatory agencies.	Executive Office of the President: Office of Management and Budget: Regulatory Working Group	

Source: GAO.

[a]Checkmarks indicate that the recommendation has been closed as implemented.

COALITION FOR
SENSIBLE
SAFEGUARDS

March 24, 2014

Dear Senator:

The Coalition for Sensible Safeguards strongly opposes S. 1397, the Federal Permitting Improvement Act of 2013. Rather than improve the permitting process, this legislation creates a layer of cumbersome bureaucracy in the federal Office of Management and Budget, and gives great power to a "regulatory czar" in OMB.

The OMB's Chief Regulatory Permitting Officer, assisted by agency officials forming a Federal Permitting Improvement Council, would have jurisdiction over virtually every highway, energy, and other type of infrastructure project on federal lands.

The legislation would make it for more difficult for the public to raise legitimate concerns about the thousands of infrastructure projects, potentially harming both the environment and public health. It would also greatly restrict the public's access to the courts to block unwise, wasteful or environmentally damaging projects.

This bill would:

- Fail to address the cause of project delays because it is based on the demonstrably false premise that environmental reviews are the primary source of delay. There is no evidence that the federal environmental review process is a major factor in project delays. Indeed, Congressional Research Service studies of federal highway projects have concluded that the primary causes of delay are unrelated to federally mandated environmental reviews

- Limit Public Input in Federal Decisions. –The public's time for comment is shortened from 90 to 60 days, and in some cases, citizens are given fewer than 60 days to weigh in. In addition, the window for citizens to seek judicial review of a project is reduced *from six years to less than six months (150 days.)*

- Potentially eliminate federal Environmental Review. – The bill allows project sponsors to ask that projects be reviewed under state standards. Since states often have weak regulatory agencies, or energy commissions that have long been dominated by industry interests, this would greatly weaken crucially needed assessment of the impacts of these projects on public health and the environment.

- Substantially Limit Judicial Review – the bill vastly weakens the power of citizens to stop a project for which they have serious concerns through a court injunction. The bill directs a court to grant an injunction based not only on the merits of the case, but also on its impact on the economy and job creation. It also would restrict access to the judicial process to citizens who complained early enough and with sufficient specificity.

- Undermine the Intent of the National Environmental Policy Act. When passed by an overwhelmingly bi-partisan Congress forty years ago, NEPA had the twin goals of allowing the public to participate in the decision-making process and ensuring that the true impacts of Federal projects are disclosed. NEPA's guarantees of public input and government transparency are crucial to protecting federal lands and local from short-sighted and uninformed project development. This bill would not address the primary causes for project delays and its supposed remedies would gut crucial environmental and public health protections.

We urge your opposition.

Sincerely,

Katherine McFate, President and CEO,
Center for Effective Government
Co-chair, Coalition for Sensible Safeguards

Robert Weissman, President,
Public Citizen
Co-chair, Coalition for Sensible Safeguards

The Coalition for Sensible Safeguards is an alliance of consumer, labor, scientific, research, good government, faith, community, health, environmental, and public interest groups, as well as concerned individuals, joined in the belief that our country's system of regulatory safeguards provides a stable framework that secures our quality of life and paves the way for a sound economy that benefits us all.

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March 10, 2014

The Honorable Jon Tester
Chairman
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and Effectiveness of Federal Programs
and the Federal Workforce
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The Honorable Rob Portman
Ranking Member
Subcommittee on the Efficiency
and Effectiveness of Federal Programs
and the Federal Workforce
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Dear Chairman Tester and Ranking Member Portman:

On behalf of the more than 200 CEO members of Business Roundtable, who lead companies that operate in every sector of the U.S. economy, we applaud the Subcommittee for holding an important hearing on smart regulation titled, "A More Efficient And Effective Government: Improving the Regulatory Framework." I have attached a written statement that I respectfully submit for the hearing record.

Nearly three-quarters of Business Roundtable CEOs list regulations as one of the top three cost pressures facing their businesses. Roundtable CEOs believe that a smarter regulatory system and a more streamlined federal permitting process will help drive increased business investment, economic growth, and job creation.

As advocates for smart regulation, America's business leaders support efforts to make the federal regulatory process more transparent and open to public engagement, which will result in better information quality, smarter rules, and more objective cost-benefit analyses.

Our statement:

- Calls for greater and earlier public engagement in the regulatory process, better quality information, more objective cost-benefit analysis and completing the notice and comment process;
- Is substantially in agreement with the recommendations of the President's Council on Jobs and Competitiveness (Jobs Council);

- Advocates for a streamlined federal permitting process, which is supported by building trades unions and other broad-based business groups; and
- Calls for new processes and procedures for conducting retrospective reviews of out-of-date and unnecessary rules.

On behalf of the CEOs of Business Roundtable, I respectfully request you consider our recommendations. We look forward to working with you and your staff to enact much-needed smart regulation legislation.

Sincerely,

Andrew Liveris

Andrew N. Liveris
Chairman and CEO
The Dow Chemical Company
Chair, Select Committee on Smart Regulation
Business Roundtable

AL/lg

Business Roundtable

Statement for the Record

Business Roundtable
Before the
Subcommittee on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce
Committee on Homeland Security and Government Affairs
United States Senate

Hearing on
"A More Efficient And Effective Government: Improving the Regulatory Framework"

March 11, 2014

Business Roundtable, an association of chief executive officers who lead companies that operate in every sector of the U.S. economy, appreciates the opportunity to submit this statement for consideration by the Subcommittee on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce. Our statement makes the case for a smarter regulatory system and a streamlined federal permitting process.

Nearly three-quarters of Business Roundtable CEOs list regulations as one of the top three cost pressures facing their businesses. Roundtable CEOs believe that a smarter regulatory system and a more streamlined federal permitting process will help drive increased business investment, economic growth and job creation.

As advocates for smart regulation, America's business leaders support efforts to make the federal regulatory process more transparent and open to public engagement, which will result in better information quality, smarter rules and more objective cost-benefit analyses.

Our recommendations outlined below:

- Call for greater and earlier public engagement in the regulatory process, better quality information, more objective cost-benefit analysis and completing the notice and comment process;
- Are substantially in agreement with the recommendations of the President's Council on Jobs and Competitiveness (Jobs Council);
- Advocate for a streamlined federal permitting process, which is supported by building trades unions and other broad-based business groups; and
- Call for new processes and procedures for conducting retrospective reviews of out-of-date and unnecessary rules.

Improving the Regulatory System

At present, U.S. businesses, both small and large, are increasingly burdened by the cumulative impact of regulations issued under the current process. While each of these rules was well intentioned, their collective effect has begun to hobble the U.S. economy:

- **Compliance costs money.** Federal agencies regularly issue rules costing hundreds of millions and even billions of dollars annually. These costs are added to businesses' ongoing compliance expenditures – expenditures that their foreign competitors may not have to make. It is crucial that regulatory requirements be justified, cost-effective and understandable.
- **Innovation is vital to our future.** American businesses are the world's most innovative, and that innovation maintains our competitive advantage and preserves our standard of living. Rules that require particular technologies or approaches or that fail to keep up with technological evolution can jeopardize future innovation.

- **Investment requires certainty.** If companies are uncertain what regulators will require or how to comply with rules, they will be reluctant to commit capital to new or expanded productive investments. But this sort of investment is key to growing our economy and providing good-paying jobs for all Americans.

Business Roundtable endorses legislation that would make the regulatory process more effective. The needed reforms fall into a handful of basic categories, each of which is addressed by one or more bills currently pending in Congress, most of them before the Homeland Security and Governmental Affairs Committee.

Greater and Earlier Public Engagement

Notice and comment rulemaking has been described as "one of the greatest inventions of modern government"[1] and represents the most important example of "crowdsourcing" by the federal government. But it can be improved. Right now, the first inkling most citizens may get of an agency's thinking is when the agency publishes a Notice of Proposed Rulemaking in the Federal Register. Yet by then, the agency has already invested substantial resources in the option or options that it is proposing, and it can be difficult for an agency to change course significantly. A range of useful reforms could increase public engagement without changing the "rules" governing how agencies make decisions about the content of rules.

The most important reform Congress can make in this connection is to require agencies to give the public earlier notice of the problem they are trying to solve, so that those with the greatest understanding of the issues, and the potentially affected activities, can provide agencies with the benefit of that knowledge when agencies can still readily make optimum use of it. This can be accomplished in several ways:

- *Evergreen regulatory agendas.* Currently, federal agencies only update their "regulatory agendas" of ongoing rulemakings twice a year (only once in 2012), and usually months late. Congress should bring this important transparency mechanism into the 21st century by requiring agencies to update their agendas on a monthly basis. Agencies would also have to assign docket numbers to each rulemaking entry, so that interested persons wouldn't have to wait for a notice of proposed rulemaking to offer input on achieving the goals of the rulemaking. The *Achieving Less Excess in Regulation and Requiring Transparency Act of 2014* – the *ALERRT Act* (Title I of H.R. 2804, currently pending before the Homeland Security and Government Affairs Committee would do this).

- *Notice of initiation.* Agencies' regulatory agendas could contain information, and solicit input, on rulemakings initiated in the prior month. But the Federal

[1] Kenneth Culp Davis, ADMINISTRATIVE LAW TREATISE § 6:15, at 283 (Supp. 1970).

Register is still the 'document of record' regarding the regulatory process and the primary way by which the public learns about rules. Thus, it is appropriate to require an agency to publish a very brief notice there when it decides to initiate a major rulemaking. The notice need only:

- Explain in a few sentences the problem the agency is trying to solve;
- Indicate how members of the public could submit information and views to the docket; and
- Invite the public to submit proposed alternatives for accomplishing the agency's objectives most effectively or at least cost.

The White House Office of Management and Budget (OMB) would not be expected to review, much less approve, these notices. The Senate version of the *Regulatory Accountability Act,* S. 1029, pending before this Committee, would require this.

- *Complete/electronically accessible administrative records.* A rulemaking must be supported by the administrative record, and commenters must have access to that record in order to comment effectively. Yet rules sometimes appear in the Federal Register (thus triggering the public comment period) before the agency has placed all the underlying analyses in the record. The *Regulatory Accountability Act* would require agencies to place in the electronic docket, by the date the proposed rule is published, all of the information received or considered by the agency in connection with the rulemaking up to that point. Agencies would be required to add promptly to the docket all information they receive subsequently from commenters. Agencies would have to seek comment on critical new information that they receive after the close of the comment period and that they intend to rely upon.

- *Minimum comment periods.* The *Administrative Procedure Act (APA)* does not establish a minimum length of time for public comment on a proposed rule. The *Regulatory Accountability Act* would establish two minimums:
  - 90 days for major rules; and
  - 60 days for all other rules.

- *Standards for guidance documents.* Legislation could set transparency-related standards regarding agency guidance documents (or subsets such as significant guidance documents or economically significant guidance documents). These include language to be used or avoided, electronic access, and notice and comment. The *Regulatory Accountability Act* accomplishes some of these goals; OMB's Bulletin for Agency Good Guidance Practices could be another source of provisions.

Better Quality Information

A regulation can only be as good as the information on which it is based. The notice and comment process recognizes that members of the public generally have the best information about topics on which agencies plan to regulate. The regulatory system should enable members of the public not only to provide information, but also to help gauge the quality of the information upon which agencies rely (or propose to rely) – to ensure that it is the best available and meets fundamental quality standards.

The *Regulatory Accountability Act* would require agencies to adopt rules only on the best available scientific, technical or economic information. It would also establish a "mini-trial" process to resolve specific scientific, technical, economic or other complex factual issues that are genuinely disputed, where the resolution of those issues would likely have an effect on the costs and benefits of the proposed rule – minimizing judicial challenges later based on such disputes. Finally, the House-passed version of the bill (H.R. 2122, also referred to the Committee) would confirm that agency decisions on information quality occurring outside the rulemaking context are reviewable in court – a needed clarification.

More Objective Cost/Benefit Analysis

Cost-benefit analysis of economically significant rules issued by executive branch agencies, overseen by OMB, has been required by every administration, of both parties, for decades. Careful review of regulatory and non-regulatory alternatives is the only way to ensure that agencies only regulate when the benefits of regulation justify the costs, and that agencies adopt the least costly regulatory alternatives that meet the objectives of the underlying statute. Wherever possible, agencies should adopt performance-based rules and use economic incentives and publication of information in lieu of command-and-control approaches. Several approaches could improve agency analyses:

- *Codify EO 12866.* The *Regulatory Accountability Act* would codify current principles and standards for rulemaking. OMB would be required to issue guidelines regarding the assessment of costs, risks and benefits, and agencies would be required to provide reasoned explanations of how they evaluated the guidelines and other considerations specified in the bill.

- *Extend Executive Branch oversight to independent regulatory boards and commissions.* Currently, rulemaking by agencies like the SEC or the FCC is not subject to OMB oversight, even though the Administrative Conference of the United States, the National Academy of Public Administration and the American

Bar Association have supported such oversight.[2] S. 1173, currently before the Committee, would correct that inconsistency.

- *Promote replicability of cost-benefit analyses.* It could be extremely informative if interested persons could redo the cost-benefit analyses underlying economically significant rulemakings to explore the effect of making adjustments to either the data or assumptions on which they are based or the models they employ. Agency analyses are all supposed to follow common OMB guidance (principally Circular A-4). Nonetheless, these analyses typically do not contain enough disclosure regarding inputs or models for anyone besides their authors (including OMB) to replicate them. Legislation could require all agencies – at the time they propose or finalize a major rule – to disclose the data or assumptions and models they use to generate the analysis for that rule in sufficient detail that any technically competent person could recreate the agency's analysis – and run variations on it.

Completing the Notice and Comment Process

Key to ensuring transparency and greater public engagement in rulemaking is the notice and comment process. Ways to improve that process include:

- *NPRM expiration.* Notices of proposed rulemaking never expire, and many have been left hanging fire for a decade or more. It can take agencies a long time to complete all the required analyses, and no one supports rushed rulemaking. But at some point the record becomes too stale to support a final rule. And agencies sometimes give proposed rules quasi-final status, giving them an inappropriate level of coercive force. For all these reasons, the *Regulatory Accountability Act* provides that proposed rules would expire after two years. If an agency wanted to maintain rulemaking, it would need to publish explaining why it needed up to another year to complete the rulemaking.

- *Ensuring that "interim rules" are truly interim.* The *APA* allows agencies to dispense with notice and comment for "good cause." In some of those cases – i.e., where notice and comment would be impracticable or contrary to the public interest – agencies have developed the practice of issuing "interim" (or "interim final") rules. Sometimes agencies will seek comment on these rules and then reissue them in final form – in fact, some agencies do this as a matter of course. But there is no legal requirement that agencies ever revisit interim final rules, and too often agencies do not. To prevent this situation, the *Regulatory Accountability Act* requires agencies to request comments on all interim rules.

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[2] *See* Administrative Conference of the United States, Recommendation 88-9, "Presidential Review of Agency Rulemaking," 54 Fed. Reg. 5207 (Feb. 2, 1989), ¶ 2; National Academy of Public Administration, "Presidential Management of Rulemaking in Regulatory Agencies" (Jan. 1987), American Bar Association, Recommendation 302 (Aug. 7-8, 1990).

The agency would be required to issue a revised final rule within 270 days of issuance of the interim rule (or within 18 months in the case of a major or high-impact rule). Otherwise, the interim rule would cease to have legal effect.

- *Midnight rules.* Administrations often rush out politically unpopular rules in their waning days. A new administration has no power to rescind these without going through a new rulemaking. The *Regulatory Accountability Act* would implement a recommendation of the Administrative Conference of the United States that would allow new administrations to quickly seek comment on newly finalized rules to determine whether to amend or rescind them.

Streamlining the Federal Permitting Process

Against the backdrop of continued subpar economic growth and unemployment rates that still are too high some five years after the current economic recovery began, policymakers have an obligation to identify and address factors that continue to impair economic growth and job creation. The federal permitting process is one of those factors. Poorly coordinated or duplicative permit application reviews; unenforceable or non-existent deadlines for review; and lack of clarity regarding what is expected of applicants can unnecessarily delay infrastructure projects. This increases project costs, introduces uncertainty and may result in cancellation of an investment and the loss of jobs associated with it. Excessive litigation can also stall needed projects, regardless of the merits of the suit. Business Roundtable highlighted these problems and proposed a suite of reforms in its April 2012 report, *Permitting Jobs and Business Investment*.

There is widespread agreement that the permit system is broken: We are not alone in identifying the federal permitting process as one in need of reform. The President, the President's Jobs Council, building trades unions and other broad-based business groups have called for improvements to the federal permitting process in order to accelerate job creation and build infrastructure needed for the 21st century.

Congress has recognized the need to accelerate the permitting process and overwhelmingly passed bipartisan legislation that included provisions to speed permitting of surface transportation projects (MAP-21, Pub. L. 112-141 (July 6, 2012)) and has adopted similar provisions for water projects in bipartisan House and Senate *Water Resource Development Act* bills currently pending in conference.

The President has initiated promising administrative steps to reform permitting: On March 22, 2012, the President signed Executive Order No. 13604, *Improving Performance of Federal Permitting and Review of Infrastructure Projects*, that is designed to: institutionalize best practices for coordination on permitting and review processes; develop mechanisms to better communicate priorities and resolve disputes; identify timeframes and agency responsibilities in reviewing applications; and utilize

information technology systems (Dashboard) to share environmental and project-related information with the public, project sponsors and permit reviewers.

Building on Executive Order No. 13604, on March 17, 2013, the President signed a Presidential Memorandum – *Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures* – directing federal agencies to prepare a plan for the comprehensive modernization of federal review and infrastructure projects with the goal of reducing aggregate timelines for major infrastructure projects by half, while also improving outcomes for communities and the environment by institutionalizing best-management practices.

While still a work in progress, Executive Order No. 13604 and the President's *Modernizing Federal Infrastructure Review* memorandum have had some early success in reducing the time for permit review. For example, the Administration cites recent approval of the Tappan Zee Bridge replacement project in New York, which saved up to three years on the timeline of this multi-billion dollar project.

In a May 2013 Report to the President, *Rebuilding America's Infrastructure: Cutting Timelines and Improving Outcomes for Federal Permitting and Review of Infrastructure Projects*, the authors indicated that of the 50 major infrastructure projects expedited pursuant to EO 13604 as of the date of the report, anticipated time savings for projects ranged from several months to several years. The authors also cite U.S. Army Corps of Engineers Civil Works project planning reforms that are expected to reduce average timelines for large complex projects, such as the Central Everglades Planning Project, from 10 years to three years or less.

The Administration's initiatives resulting in the California Desert Renewable Energy Conservation Plan and the Western Solar Plan that provides a blueprint for utility-scale solar energy permitting in Arizona, California, Colorado, Nevada, New Mexico and Utah promise to make permitting on federal lands more expeditious and predictable while minimizing multiple use conflicts and environmental impacts.

Codification of reforms is needed: While the Obama Administration's initiatives are promising, their effectiveness depends on continuous reviewing agency "buy-in" and management perseverance in ensuring that best practices are institutionalized and followed over the long term. Moreover, to date, most of the projects designated by the Administration for expedited review have been infrastructure projects they consider to be of national or regional interest. It remains to be seen whether best practices can be effectively propagated throughout government for projects of lesser significance. These reforms are important steps in the right direction, but they fall short of the permanent, government-wide adoption of best practices needed to make government work better, more efficiently and in a more coordinated way to improve the permitting process and community and environmental outcomes.

Senators Portman (R-OH) and McCaskill (D-MO) have introduced bipartisan legislation (S. 1397, *Federal Permitting Improvement Act*) that is modeled after MAP-21, the President's Jobs Council recommendations, the President's administrative initiatives and the Roundtable's 2012 report. The bill would largely codify, expand and make permanent the permit streamlining efforts by the President.

The Portman-McCaskill bill is designed to lead to: better agency coordination and deadline setting; improved transparency; and reduced litigation delays and uncertainty by reducing the opportunity for judicial review of permits associated with a covered project from six years to 150 days. It also would require a reviewing court, in considering a request for injunctive relief, to consider potential job or other economic losses from an injunction. Importantly, the legislation does not change the substantive standards or safeguards in any underlying law. It will improve and expedite the process for reaching a decision.

In short, the Portman-McCaskill bill will expand, codify and make permanent the permit streamlining efforts broadly acknowledged to be necessary. We believe this bill is an essential component of any comprehensive regulatory reform agenda.

Retrospective Review of Existing Regulations

Because of the considerable burden and costs associated with regulation, there have been multiple proposals for the re-evaluation of existing and sometimes longstanding federal regulations. The Code of Federal Regulations currently stands at 238 volumes consisting of more than 174,000 pages.

The accumulated and cumulative costs of regulation over time represent a genuine problem for our economy, as well as for individual companies and other regulated parties. Likewise, the problem of out-of-date rules, or unnecessary rules, is one that has important impacts. It is all too rare that agencies ask whether the original problem a regulation was issued to address has been solved or could be addressed more cost-effectively.

Over time, various administrations have sought to take various actions to address these concerns. President Reagan sought to do so with Executive Order 12291, and his Presidential Task Force on Regulatory Relief. President George H.W. Bush sought to do so through the Competiveness Council. President Clinton sought to do so in the National Performance Review. President George W. Bush did so through an Office of Information and Regulatory Affairs (OIRA) process inviting nominations to address existing rules. And President Obama did so through Executive Order 13563. Moreover, section 610 of the *Regulatory Flexibility Act of 1980* has long required periodic agency review of certain categories of rules with impacts on small entities.

What all of these efforts have shown is that retrospective review of existing regulations is a challenging task, and one not readily susceptible to across-the-board, "one-size-fits-all" approaches. Such reviews are not necessarily equally useful for all types of rules. For example, where rules involved high-sunk costs and high-transition costs, consideration of changes can itself be unhelpful. Moreover, new costs often have greater impacts than those from longstanding rules, to which regulated parties have already adapted. Nor should efforts to review old regulations distract from the vital need to focus on current and newly proposed rules – and a valid assessment of their costs and benefits – because the burdens associated with new rules are so often greater than those from the past.

Finally, an across-the-board requirement to reassess old rules would likely become a pro forma exercise that would not seriously engage the relevant stakeholders or interests. However, in some situations, retrospective review of existing rules is plainly necessary and helpful. When that is so, an important principle of reform is that the identification of such rules for review not be allocated solely to agencies themselves. Agencies lack the incentives and the resources to determine which regulations are most in need of such review. Moreover, agencies are inherently stakeholders in their own regulations, and not sufficiently neutral and dispassionate. Accordingly, reforms that would enable the public to nominate rules for retrospective reviews, or that would place such decisions in the hands of independent reviewers, are more likely to produce results beneficial to our economy and our society.

Business Roundtable is also continuing to review a number of pending legislative proposals that involve requirements for retrospective review of regulations. (Examples include S. 1390, the *Regulatory Improvement Act*, introduced by Senators King and Blunt, and H.R. ___, the *Searching for and Cutting Regulations that are Unnecessarily Burdensome Act of 2014* (SCRUB Act)). To date, the one legislative proposal that Business Roundtable has endorsed with a retrospective review requirement is the *Regulatory Accountability Act*, also referenced above. That bill at section 3(i) provides:

> "(i) RIGHT TO PETITION AND REVIEW OF RULES.—
> "(1) Each agency shall give interested persons the right to petition for the issuance, amendment, or repeal of a rule.
> "(2) Each agency shall, on a continuing basis, invite interested persons to submit, by electronic means, suggestions for rules that warrant retrospective review and possible modification or repeal.

That provision would enable members of the public, including regulated entities, to identify rules in need of review, and would require agencies to solicit such input on a regular basis. While not a panacea, that provision in the *Regulatory Accountability Act* would be a small but useful part of necessary regulatory reform to improve our federal regulatory process. At the same time, it would not detract from the larger and more

urgent need to reform the manner in which new regulatory costs and burdens are imposed. The *Regulatory Accountability Act* addresses that in a highly constructive and bipartisan way.

Adequate Resources for the Office of Information and Regulatory Affairs

Another indispensable element to this sort of regulatory reform is to increase the resources available to OIRA within OMB. When OIRA was created in 1981, the office had a full-time equivalent (FTE) authorization of 90 staff members; this year that number is down to an all-time low of 44. Business Roundtable suggests that it is critical that OIRA be provided with additional staff resources.

Sen. Tester

Please outline the mission of the permit streamlining task force led by the Council for Environmental Quality and OMB's Office of Performance and Personnel Management, including an indication of when its recommendations will be released.

As the OIRA Administrator, I do not have primary responsibility for working on permitting issues. That said, I look forward to working with the appropriate CEQ and OMB offices where there is a nexus between regulations and the efforts to improve the effectiveness and efficiency of the Federal permitting and review processes. I am aware that the Steering Committee on Federal Infrastructure Permitting and Review Process Improvement (Steering Committee) facilitates improvements in Federal permitting and review processes for infrastructure projects, including identifying a set of best practices for efficient review and permitting. Last month the Administration identified modernizing infrastructure permitting as one of its 15 Cross-Agency Priority Goals, which are designed to support coordination on priority areas which cut across multiple agencies and programs. As a Cross-Agency Priority Goal, the Administration will regularly report progress on this effort through Performance.gov.

Sen. Tester

What are the legal and/or practical obstacles to publicly posting summaries of discussions conducted between OIRA and outside parties, in addition to names of parties and printed documents?

During conversations with outside parties, OIRA remains in listening mode, so the only information relayed comes from the outside parties themselves. Outside parties can bring printed documents to the meetings, which are then posted online for the public to see. Those written materials often contain a good summary of the subject and content of the meeting. As a practical matter, the need to summarize, fact check, and gain approval of such notes would delay the posting of notice to the public that the meeting took place.

Sen. Tester

What are the legal and/or practical obstacles to adjusting the $100 million standard for "economically significant" rules to current dollars, or roughly $500 million?

While there are no legal hurdles to making such an adjustment, this would require a change to the Executive Order governing regulatory review. Any such changes would need to be discussed and vetted with the regulatory agencies. Another practical consideration is that such a change would make the monetary definition of an "economically significant" rule under the Executive Orders different from the definition of "major" under the Congressional Review Act (CRA). Agencies must report to Congress on their analysis conducted for all major rules under the CRA. Also, Executive Order 12866 still requires agencies to assess the potential costs and benefits of regulatory actions, even if they are not designated as "economically significant."

Sen. Tester

Executive order directs disclosure of all "substantive" changes to a rule during the review process, which includes the informal review process. What are the legal and/or practical obstacles to identifying substantive changes between submitted and final rules to the public, whether through "redlining" or some other format?

Changes to a rule during OIRA's interagency review process, whether changes made by OIRA, the drafting agency, or anyone else in the Federal government, can be seen after the rule is published by comparing the published version to the draft that was submitted to OIRA for review.

Sen. Tester

To what extent does OIRA coordinate with the Small Business Administration's Office of Advocacy to ensure regulations take the challenges faced by small businesses into account? Are there additional opportunities in these areas to help lighten the regulatory burden on small businesses? How can Congress be a partner in this effort?

The Small Business Administration Office of Advocacy regularly gives comments on rules that are under review and is a valuable partner in helping to consider ways to reduce regulatory burdens on small businesses. Small businesses are critical to our economic growth and job creation and this Administration is committed to eliminating excessive or unjustified burdens on small businesses. President Obama issued a Memorandum the same day he issued EO 13563 in which he directed Federal agencies to consider ways to reduce regulatory burdens on small businesses and provide justifications when such flexibilities are not included in proposed regulations. There are many ways that agencies implement this memorandum, including providing exemptions for small businesses or phasing in requirements for small businesses. The Administration has also launched a government-wide review of regulations on the books – a "regulatory look-back" -- to streamline, modify, or repeal regulations and reduce unnecessary burdens and costs, with particular attention to rules that impact small businesses.

Sen. Tester

To what extent does OIRA disclose the justification for breaking the 90-day review deadline for a particular rule? What level of disclosure is currently required by law?

The 90-day review period is not a legal deadline, but is instead a normative period set out in Executive Order 12866. Executive Order 12866 explicitly contemplates that this review period can be extended. The length of the review depends substantially on the rule under review—for example, its level of complexity or the number of agencies with substantial equities in the rulemaking. I am committed to ensuring that OIRA reviews rules as expediently as possible, consistent with maintaining the level of careful analytical rigor required by the Executive Order.

Sen. Tester

Does OIRA dictate when agencies can submit rules for formal review? To what extent does OIRA engage with agencies before the 90-day "clock" starts ticking?

Agencies often have discussions with OIRA about the regulations they are considering sending to OIRA for interagency review. In order to ensure that OIRA, other offices within the Executive Office of the President, and other interested Federal agencies have sufficient time and resources to properly review a rule, we do also sometimes discuss with agencies the sequencing of the submission of their various rulemakings.

Sen. Portman

I strongly support the Administration's emphasis on asking federal agencies to "look back" and eliminate inefficient old rules. Such regulatory housecleaning, which has actually been required by law since 1981, is essential to smarter regulation and reducing overall burdens. I understand that agencies have just yesterday posted their most recent retrospective review updates. It will take some time to digest all that information. But I worry that the early results aren't promising.

Just looking at the first 90 regulations examined under the regulatory look-back, the estimated compliance cost savings is $3.3 billion, according to an analysis by the American Action Forum of agency data published in the Federal Register.[1] Your testimony today suggests that more recent efforts may have boosted look-back cost savings to around $10 billion.

When you put that figure in context, the picture becomes less encouraging. According to data reported by the agencies themselves, in 2012 alone the Administration's new regulations imposed $236 billion in new burdens. In fact, according to the same American Action Forum report, looking at data from the first 90 regulations reviewed, new costs attributable to the regulatory look-back totaled $11 billion. In other words, the costs of regulations attributed to the early look-back rules actually exceeded the cost savings.

The most recent analysis I've seen examining quantified rulemaking in the retrospective reports found that rules increasing costs outnumber rules implementing cost-saving measures by a ratio of 3.7 to 1.[2]

- **Are the findings by the American Action Forum consistent with any review of the effectiveness of regulatory look-back conducted by OIRA? What can be done to improve the regulatory look-back process and to ensure that it does not generate more costs than benefits?**

- **Do you see merit in retrospective review provisions that would allow members of the public to petition for specific retrospective reviews, helping identify the most troublesome rules?**

- **Your written testimony noted that the net benefits (benefits minus costs) of federal regulations reviewed by OIRA in the first four years of the current administration totaled $159 billion, with another $25 billion promised for the fifth year. Am I correct that these figures are based on agency predictions of the benefits and costs of their regulations before they are implemented, rather than actual results? Will the**

[1] Sam Batkins and Ike Brannon, *The Need For Retrospective Review Of Regulations*, Regulation, at 3-4 (Summary 2013), *available at* http://www.cato.org/sites/cato.org/files/serials/files/regulation/2013/6/regulation-v36n2-6_0.pdf#page=2.

[2] Sam Batkins, Testimony Before the House Subcommittee on Regulatory Reform (Feb 11, 2014).

> **administration's retrospective review initiative produce quantitative evidence on the actual benefits and costs of regulations after they were implemented?**

To ensure that regulations on the books are as effective, streamlined, and cost-justified as possible, the Administration is committed to retrospective review of regulations. In addition to the $10 billion that will be saved in the near term from regulations that have already been finalized, agencies are working on a number of other important look-back rules. For example, the Department of Transportation recently proposed to rescind the requirement that truck drivers submit and retain driver-vehicle inspection reports when the driver has neither found nor been made aware of any vehicle defects or deficiencies. When finalized, this change could save tens of millions of hours in paperwork burden per year, for approximately $1.5 billion in annual paperwork time savings, or an additional $7.5 billion in savings over 5 years. Public participation has been an important component of our regulatory look-back efforts to date, and will continue to be important in the future.

I have not reviewed the American Action Forum reports in any detail, but a cursory read suggests that the report has a number of inaccuracies. For example, our Report to Congress on the Benefits and Costs of Federal Regulations reports that, according to agency analyses, the estimated annual costs of rules review by OMB and finalized in FY 2012 total between $14.8 billion to $19.5 billion, not the over $200 billion identified in the report.

The estimated net benefits of rules reviewed by OIRA are based on prospective agency analyses, and the rules included in this report could be candidates for a retrospective analysis after they have been fully implemented.

Sen. Portman

I understand that even at current staffing levels your office has been working hard to reduce the length of OIRA regulatory reviews. Everyone supports eliminating unnecessary delay. But in my mind, we want to ensure more rigorous regulatory analysis rather than simply faster review. A recent study found that longer and more thorough OIRA review is associated with higher-quality Regulatory Impact Analysis at agencies and better explanation of how an agency used the analysis to inform its decisions.[3]

- **What must OIRA do to help ensure that speedier review does not sacrifice the quality of Regulatory Impact Analysis and the quality of decisions informed by that analysis?**

As I mentioned in my testimony, OIRA's goal is not to speed up the review of rulemakings at the expense of quality. In fact, I stated that while unnecessary delays can be harmful, OIRA's consideration of Federal regulations must first and foremost uphold the standards of analysis and decision making the Executive Orders establish.

[3] Jerry Ellig & Rosemarie Fike, *Regulatory Process, Regulatory Reform, and the Quality of Regulatory Impact Analysis*, Mercatus Center Working Paper, George Mason University, July 2013.

Sen. Portman

As you know, there is widespread and bipartisan agreement about the need for permitting reform. The President's Jobs Council recognized that we "can take a few simple steps—without undercutting the protections that our regulatory system provides—to smooth and streamline the process for obtaining permits."[4] This recommendation flows from studies by the Chamber of Commerce and the Business Roundtable, and such permitting reforms are supported by the AFL-CIO, Building and Construction Trades, and other labor leaders, who recognize that improving our federal permitting process is essential to renewed capital investments and jobs.

The Federal Permitting Improvement Act—which I introduced with Senator McCaskill and has a growing list of bipartisan cosponsors, including you—is modeled on the commonsense and bipartisan permit-streamlining reforms of the 2006 and 2012 transportation bills and recommendations from the President's Jobs Council and other recent studies.

The bill would improve the permitting process for major capital projects in three basic ways: (1) better coordination and deadline-setting for permitting decisions; (2) enhanced transparency through early agency consultation and an online permitting "dashboard" to track the status of approvals; and (3) reduced delays from strategic litigation. It would not alter substantive environmental standards or safeguards, but instead seeks to create a smarter, more transparent, better-managed process for government review and approval of major capital projects.

In March 2012, President Obama issued Executive Order 13604, aimed at "Improving Performance of Federal Permitting and Review of Infrastructure Projects." The implementation plan is aimed at (1) more efficient and effective review certain projects, culminating in faster permit decision-making and review timelines; and (2) transparency, predictability, and accountability for infrastructure permitting. According to the White House, since the President issued Executive Order 13604, agencies have expedited their review of 50 major projects, 22 of which have completed the federal permitting process.

A significant aspect of the President's permitting initiative was a "dashboard" website containing a searchable database of information for certain projects selected as part of the initiative. My Federal Permitting Improvement Act (S. 1397) includes the creation of a permitting "dashboard" similar to the White House initiative. This dashboard—which would be available for a larger number of projects and provide information on the status of permits, approvals and NEPA reviews—would provide more transparency and accountability in the permitting process.

As part of its process of reviewing draft rules, OIRA encourages coordination among various agencies and entities involved in the rulemaking process. Similarly, one of the

[4] President's Council on Jobs and Competitiveness Report.

tenets of the Federal Permitting Improvement Act is early coordination among the agencies engaged in the permitting review process. This kind of early coordination leads to greater cooperation among agencies and a more efficient review. We have seen documented successes of these types of permit streamlining provisions through the implementation of the American Recovery and Reinvestment Act and the last two highway transportation bills (SAFETEA-LU and MAP-21).

- **As OIRA Administrator, what do you see as the benefits of early coordination among agencies involved in the permitting review process in terms of streamlining the federal permitting process?**

As the OIRA Administrator, I do not have primary responsibility for the Administration's efforts to modernize and improve the efficiency of the Federal infrastructure permitting process. That said I believe these efforts have demonstrated that early consultation and coordination among agencies with potential permitting or review responsibilities can help identify and resolve potential issues of concern early in the process, thus avoiding unnecessary delays.

Sen. Levin

In April 2013, OMB Director Burwell testified before this Committee as part of her nomination process. She testified that Congress had spoken to the matter of independent agencies, and that she would work to support the implementation of Congress' intent for independence. Director Burwell also testified that she had not yet reached a conclusion on the adequacy of cost-benefit analyses performed by independent agencies, and that she needed to gain a better understanding of what may be appropriate for independent agencies. Do you support the concept of independent agencies, meaning agencies that by statute have a measure of independence from the President? Do you agree that agencies involved in financial regulation and enforcement, and consumer product safety, need to have that measure of independence? Is it your view that the cost-benefit analyses conducted by independent agencies now are generally adequate?

I appreciate the long tradition and unique roles of the independent agencies and believe in the importance of their continued independence. Both Republican and Democratic Administrations have acknowledged and recognized this importance over the years. I am not in a position to make a general judgment about the adequacy of independent agency analyses, because OIRA generally does not review the rules of independent agencies.

Sen. Levin

During his confirmation hearing before this Committee, your predecessor Cass Sunstein, stated, "[C]ost- benefit analysis shouldn't put regulation in an arithmetic straitjacket, that there are values, moral, distributional, aesthetic, and otherwise that have to play a part in the overall judgment about what's to be done. And I would emphasize even more than those things that I've stressed as a scholar, which are the limits of purely economic approaches to evaluation of cost and benefits." Can you please explain how your views of cost-benefit analysis differ or are similar to the view given by Mr. Sunstein? Please also comment on your view of the appropriate role, use, and review of cost-benefit analysis in major rulemakings.

I support the framework for cost-benefit analysis laid out in Executive Order 13563, which explicitly states that each agency must "select, in choosing among alternative regulatory approaches, those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; *distributive impacts; and equity*)... Where appropriate and permitted by law, each agency may consider (and discuss qualitatively) values that are difficult or impossible to quantify, *including equity, human dignity, fairness, and distributive impacts*" (emphasis added). I agree that cost-benefit analysis is a critical tool for the evaluation of regulations but it is neither the only tool nor a tool that is sufficient or appropriate in all circumstances.

Sen. Levin

In 2001, Cass Sunstein authored a working paper, "The Arithmetic of Arsenic," where he concluded that an analysis of the benefits of EPA's rules to prohibit arsenic in drinking water gave only broad ranges, and that such an analysis failed to provide a clear path forward for regulatory agencies. What is your view of that paper? How do OIRA's regulatory reviews capture social goals or so-called "soft variables," like preventing water from being polluted, that may be difficult, if not impossible, to accurately quantify?

I am not familiar with the specific paper in question. As mentioned above, I support the framework for cost-benefit analysis laid out in Executive Order 13563, which explicitly contemplates that some values may be difficult or impossible to quantify yet still be important and valid regulatory objectives

Sen. Levin

What do you think are the legal implications for requiring the same cost-benefit analysis for independent agencies as for other major rules? Do you think that requiring a specific type of cost-benefit analysis will increase the likelihood that a rule will be approved by a Court?

In July 2011, the President issued Executive Order 13579, which encouraged independent agencies to follow the same regulatory principles that executive agencies must follow. I am not in a position to weigh in on the legal implications of requiring independent agencies to do cost-benefit analysis, nor am I able to say whether a certain type of cost-benefit analysis is more or less likely to withstand a legal challenge. As a general matter, I think it is important for both policy reasons and legal defensibility that agencies clearly justify their rules and explain why they are undertaking rulemaking.

Sen. Levin

OIRA and OMB have been criticized for a lack of transparency and timeliness in conducting regulatory reviews, with some reviews taking far longer than the 90- or 120-day expected timetable. Further, there is usually little or no information available on the reason for the delay, or on the changes OIRA required to the rulemaking in order to clear it for publication. In a January 15, 2014 interview with *Bloomberg BNA* you indicated that it is not OIRA's job to comment on a rule's policy, but rather to ensure that the required analytical elements are present when reviewing a rule. What is your response to concerns that OIRA reviews lack transparency and timeliness? What kinds of changes does OIRA make to proposed regulations after they leave an agency but before they are officially proposed? Do you believe that the public has a right to information about why changes were made to a rule after it leaves an agency but before it is published in the *Federal Register*?

The Federal rulemaking process has a strong foundation in transparency as evidenced by the notice and comment process set forth in the Administrative Procedure Act. In addition, the Administration's Open Government efforts have focused on increasing the openness of the rulemaking process. For example, the Administration launched a regulatory review dashboard at www.reginfo.gov and OIRA has issued memoranda in recent years, such as Increasing Openness in the Rulemaking Process – Improving Electronic Dockets and Increasing Openness in the Rulemaking Process – Use of Regulation Identification Number.

Agencies may make changes to a rule while it is under review at OIRA in response to comments or information from a wide range of stakeholders, not just OIRA. This includes the public and agencies across the U.S. government (including the agency that drafted the rule). Changes to a rule during OIRA's interagency review process can be seen after the rule is published by comparing the published version to the draft that was submitted to OIRA for review.

Sen. Levin

With regard to the retrospective review that has been undertaken by the Obama administration, the same January 15 *Bloomberg BNA* interview quotes you as saying that, "It's certainly going to be an area of priority for me and for OIRA over the next, I'd say, several months to a year, to try to come up with some more concrete ways to deepen and strengthen retrospective review." Please elaborate on this statement, and how you intend for OIRA to be transparent as it reviews and potentially alters existing proposed regulations?

Executive Order 13610 established retrospective review as an agency priority, and the agencies are reporting on their progress meeting their regulatory look-back obligations twice per year. If an agency conducts a retrospective review of their regulations, and concludes that a regulation should be modified, streamlined, or eliminated, it would follow the same rulemaking process it uses to issue a new regulation. For example, OIRA reviewed under Executive Order 12866 a proposed Department of Transportation regulation to rescind the requirement that truck drivers submit and retain driver-vehicle inspection reports when the driver has neither found nor been made aware of any vehicle defects or deficiencies. This change would save tens of millions of hours in paperwork burden per year, for approximately $1.5 billion in annual paperwork time savings.

Response from Katherine McFate, President and CEO of Center for Effective Government and co-chair of the Coalition for Sensible Safeguards to Senator Levin's Questions for the Record for the Hearing, "A More Efficient and Effective Government: Improving the Regulatory Framework," on March 11, 2014

Question #1: In October 2012, the Chairmen of the Board of Governors of the Federal Reserve, SEC, and Federal Deposit Insurance Corporation, Administrator of the National Credit Union Administration, Director of the Consumer Financial Protection Bureau, and the Comptroller of the Currency, wrote to this Committee, expressing concern about S. 3468, the Independent Agency Regulatory Analysis Act of 2012. S. 3468 is substantively the same as S. 1173, the Independent Agency Regulatory Analysis Act of 2013, the contents of which were raised at the hearing. In their letter, the heads of the independent agencies regulating financial markets expressed concern with S. 3468, stating that submitting their rulemakings to OIRA review "would give any President unprecedented authority to influence the policy and rulemaking functions of independent regulatory agencies and would constitute a fundamental change in the role of independent regulatory agencies." The independent regulators also warned that such a bill would prolong the rulemaking process and lead to unwarranted litigation against their rules.

Ms. McFate, is it your view that Congress established independent regulators in part to ensure that important and highly technical matters such as protecting our banking system do not become politicized or subject to the whims of a Presidential administration? Do you believe that requiring the Administration to review and pass judgment on an independent agency's technical analysis could have a muzzling effect on the agency's technical experts? Do you believe that OIRA's often much-delayed judgment should be a substitute for the technical expertise of independent regulators?

Response: Yes. I strongly agree with the assessment that S. 1173 would undermine the ability of independent agencies to render technical assessments of their subject matter and to carry out the missions of their agencies shielded from political pressure. Senator, as you know, independent agencies are intentionally established when Congress judges that the policy area affected needs to be insulated from political pressures associated with being part of the executive branch; indeed, independent agency heads have a defined tenure that is deliberately independent of the election cycle.

Forcing independent agencies to receive approval from the White House Office of Information and Regulatory Affairs (OIRA) to issue rules, as S. 1173 requires, would put the actions of independent agencies under review by an office that reports to the president, thus negating their independence. It would give the executive branch the power to stop any action by an independent agency that it opposes. Making OIRA the final arbiter on these agencies' actions is particularly troubling, since the office has long had a reputation for bringing political considerations into the rulemaking process – under the presidencies of both parties.

Moreover, the staff at OIRA are not technical experts; OIRA is staffed primarily by lawyers and economists who are not qualified to second-guess the technical judgment of agency staff with deep

substantive expertise in the fields in which they work. A report by the Administrative Conference of the United States released in December 2013 documented multiple examples of OIRA staff delaying rules for political reasons and challenging the judgment of regulatory agency staff on non-technical grounds, sometimes without respect for the mission of the regulatory agency. Expanding the power of an executive branch office known to be responsive to political pressure and influence over independent agencies completely contradicts the reason for establishing independent agencies.

Question # 2: Cost-benefit analysis may be a useful tool to weigh the pros and cons of a specific regulatory course of action in certain circumstances. However, the benefits of a specific rule may be amorphous, empirically sound analysis may not be feasible, and thus a proposed rule may be destined to fail, either through the agencies' own test parameters or through Court challenges. What action should an agency take if there are no options that pass a cost-benefit test and fulfill the statutory mandate for the rule?

Response: The primary mission of federal regulatory agencies is to protect the health and welfare of the American people. Establishing new health and safety benefits for the broad public usually has some costs to a narrow set of companies in a regulated industry. As multiple reports have shown, when health and safety benefits are monetized, they generally far outweigh the costs to the regulated industry. The inability to include many important health, safety, and welfare benefits that cannot be quantified and monetized by cost-benefit methodology results in lower than actual benefits assessments. Moreover, the data that industry provides on its own costs often proves to be exaggerated, indicating that actual net benefits are even greater than original estimates. However, cost-benefit analysis is an imperfect tool that relies on key assumptions and estimates that may be wrong and are subject to manipulation and challenge. Some experts believe it is immoral to try to put a dollar value on human life and harm.

Therefore, a regulatory agency should prioritize the statutory mandate that governs its work and mission, regardless of the outcomes of an (always imperfect and subject-to-revision) cost-benefit analysis. The results of a cost-benefit analysis represent one piece of the mass of information that an agency gathers and considers when proposing a new rule, but it should not be viewed as the determinative factor in an agency's deliberations.

Questions for the Congressional Record
U.S. Senator Rob Portman

Subcommittee on the Efficiency and Effectiveness of Federal Programs and the Federal Workforce
U.S. Senate Committee on Homeland Security and Governmental Affairs

For the Subcommittee hearing:

"A More Efficient and Effective Government: Improving the Regulatory Framework"

Tuesday, March 11, 2014

MS. MICHELLE SAGER, DIRECTOR,
STRATEGIC ISSUES, U.S. GOVERNMENT ACCOUNTABILITY OFFICE

Question 1-2: Retrospective Review

When OMB produces its annual report on the benefits and costs of federal regulation, it has insufficient data to report on the actual benefits and costs that federal regulations have produced. Instead, it uses the benefit and cost figures agencies predicted when they issued the regulations.

- **What proportion of agency retrospective reviews includes meaningful information to evaluate, *ex post*, whether a particular regulation actually produced the intended (or expected) benefits for the public?**

- **What proportion of agency retrospective reviews produce quantitative information on the actual costs of regulations after they were implemented?**

Answer: In our April 2014 report on reexamining regulations, we noted that one of the potential purposes for conducting retrospective analyses is to assess whether regulations, once implemented, achieved the expected benefits at the expected costs.[1] However, the efforts of agencies included in our review to re-evaluate original cost-benefit analyses associated with their regulations varied. In response to a questionnaire completed by agencies for this report, only three of nine agencies reported that they often conduct reviews of regulations to determine whether the regulations are accomplishing the originally intended benefits at the expected cost. The other six agencies generally reported that they rarely, if ever, do this or did not know. Some

[1] GAO, *Reexamining Regulations: Agencies Often Made Regulatory Changes, but Could Strengthen Linkages to Performance Goals*, GAO-14-268 (Washington, D.C.: April 11, 2014).

agencies said they will sometimes revisit cost-benefit estimates to improve methods or models for conducting such analyses in the future. However, a few agency officials stated that they do not believe redoing past cost-benefit analyses is useful in the context of making decisions about individual regulations looking forward.

In a broader context however, reexamining benefits and costs achieved after a regulation is implemented could provide data useful for performance reviews and is consistent with regulatory executive orders and guidance. One of the principles in Executive Order 13563 states that the regulatory system must measure, and seek to improve, the actual results of regulatory requirements. Subsequent guidance from the OIRA Administrator noted that this "points to the need for empirical assessment of the consequences of rules." We concluded that there would be more incentive to measure benefits and costs if retrospective analyses were viewed in the broader context of providing information on the actual, rather than projected, performance and results of regulatory programs and agencies. We recommended that the Administrator of OIRA take actions to ensure that OIRA, as part of its oversight role, monitors the extent to which agencies have implemented the guidance on retrospective regulatory review requirements outlined in the related executive orders and confirms that agencies have identified how they will assess the performance of regulations in the future. OIRA staff agreed, emphasizing that this remains a priority and therefore they would continue to monitor the extent to which agencies implement the guidance on retrospective regulatory review requirements. Further, OIRA staff said that as part of its review of agencies' rules, unified agendas, and regulatory plans, OIRA will continue to encourage agencies to identify beforehand how they will evaluate the effectiveness of a regulation after it has been put in place.

Question 3: Retrospective Analysis at Independent Agencies

GAO has found that a certain amount of retrospective analysis occurs organically within some rulemaking agencies, as they respond to feedback from impacted communities and address inner-agency concerns. I am pleased that some agencies are engaged in this activity beyond broader administrative requirements, and I hope it continues. But I am concerned that such analysis may not be occurring at independent agencies.

- **In your various studies of retrospective review, have you found that independent agencies are engaged in look-back activities similar to what you've observed at the agencies under executive and congressional oversight?**

Answer: In both our April 2014 and July 2007 reports on reexamining regulations, we found that all of the independent regulatory agencies within the scope of our reviews had conducted multiple retrospective regulatory analyses of existing regulations.[2] In the April 2014 report, we covered retrospective review activities of the Federal Communications Commission (FCC) and the Federal Trade Commission.[3] We found that both agencies had developed and posted final retrospective review plans, as encouraged by Executive Order 13579, and that the two agencies' completed retrospective analyses we reviewed had resulted in changes to regulations. Both agencies also said that they have well-established practices to regularly review regulations and report outcomes. In the July 2007 report, the independent regulatory agencies we assessed included the Consumer Product Safety Commission (CPSC), FCC, and the Federal Deposit Insurance Corporation (FDIC). During the 2001 through 2006 time period covered by our report, CPSC completed at least 4 reviews, FCC completed at least 47 reviews, and FDIC completed at

[2]See GAO-14-268 and GAO, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-791 (Washington, D.C.: July 16, 2007).

[3]Also related, in GAO, *Dodd-Frank Regulations: Agencies Conducted Regulatory Analyses and Coordinated but Could Benefit from Additional Guidance on Major Rules*, GAO-14-67 (Washington, D.C.: Dec. 11, 2013), we assessed financial regulatory agencies' plans to conduct retrospective reviews of existing rules. We found that the Commodity Futures Trading Commission had developed a final retrospective review plan, and the Securities and Exchange Commission was in the process of developing such a plan. Other prudential regulators reported that they generally viewed their retrospective reviews conducted by statute or policy to be consistent with Executive Order 13579's principles and objectives.

least 4 reviews.[4] All three agencies reported conducting discretionary reviews in response to petitions or other forms of industry and consumer feedback and sector changes. FCC and FDIC also reported conducting statutorily-mandated reviews. For example, FDIC conducted most of its mandatory reviews in response to the Economic Growth and Regulatory Paperwork Reduction Act of 1996, which requires federal financial regulatory agencies to identify outdated, unnecessary, or unduly burdensome statutory or regulatory requirements every 10 years.

Question 4: Conflict of Interest

Federal agencies may face an inherent conflict of interest in reviewing their own regulations, since it's always harder to be critical of one's own work.

- **Should a more neutral party—such as OIRA, GAO, or an independent congressional regulatory review office—be tasked with evaluating the actual benefits and costs of regulations after they are implemented?**

Answer: We have not taken a position on this specific question in any of our previous published reports. In general, however, as with other program strategies, the fundamental responsibility for ensuring the effectiveness and efficiency of an agency's efforts should first and foremost rest with that agency. External reviews can be helpful in ensuring that this fundamental management responsibility is done consistently and well, but consistent with internal controls, an agency's management has the primary responsibility.

Question 5-6: Transparency in Rulemaking

GAO has found that transparency and documentation of the regulatory review process could be improved. Concerns about transparency are related in large part to the centralized structure of regulatory review, and the role OIRA plays in the process.

[4]These numbers represent individual reviews conducted and not the number of regulations reviewed because, in some cases, one review covered multiple regulations.

GAO has determined that some rules have been changed significantly during the OIRA review process. Yet some claim that documentation of such changes often lacks desired transparency.

- **Did GAO find out about the changes to rules reviewed by OIRA only because it has special access as part of the federal government or could other stakeholders and the public find out about significant changes the same way GAO discovered them?**

Answer: In our prior reports in September 2003 and April 2009 on the OMB/OIRA regulatory review process, we primarily relied on publicly available documentary evidence, but this documentary evidence was supplemented by testimonial evidence from our interviews and meetings with regulatory agency and OIRA officials.[5] To address the nature of the changes attributed to OIRA or the reasons that rules were withdrawn or returned at OIRA's initiation for the September 2003 report, we primarily relied on reviews of publicly available documents in both regulatory agencies' and OIRA rule dockets, as well as copies of OIRA return letters to the issuing agency that were posted on the OMB Web site. We also interviewed officials at the agencies and OIRA to obtain information about the regulatory review process for the individual rules included in our scope and to obtain their views on whether we had accurately identified and characterized the nature of OIRA's effects (changes, returns, and withdrawals) on each rule. To report on OMB's effect on rulemaking for the April 2009 report, we relied on the same basic methodology used in 2003—reviewing documents from agencies' and OMB's dockets and interviewing officials to obtain information about the regulatory review process for selected rules. The information in rule dockets and return letters would have been available to other stakeholders and the public, but the testimonial evidence would not. For example, there are no documentation requirements on agencies or OIRA covering withdrawn rules, so we primarily

[5]See GAO-03-929 and GAO, *Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews*, GAO-09-205 (Washington, D.C.: Apr. 20, 2009).

relied on testimonial evidence from agency officials to determine whether OIRA, rather than the submitting agency, had initiated the withdrawal.

- **As you know, OIRA coordinates interagency review of regulations. Changes that occur during the OIRA review process could reflect the views of various White House offices or other federal agencies, not just OIRA staff. Do you think agencies should be required to disclose which specific entity in the federal government suggested each change to a draft regulation?**

Answer: We have not taken a position on this question in any of our previous published reports.

Senator Levin Questions for the Record for the Hearing, "A More Efficient and Effective Government: Improving the Regulatory Framework," on March 11, 2014.

Questions for Panel 3 – Michelle Sager, Director, Strategic Issues, Government Accountability Office (GAO)

(1) In October 2012, the Chairmen of the Board of Governors of the Federal Reserve, SEC, and Federal Deposit Insurance Corporation, Administrator of the National Credit Union Administration, Director of the Consumer Financial Protection Bureau, and the Comptroller of the Currency, wrote to this Committee, expressing concern about S. 3468, the Independent Agency Regulatory Analysis Act of 2012. S. 3468 is substantively the same as S. 1173, the Independent Agency Regulatory Analysis Act of 2013, the contents of which were raised at the hearing. In their letter, the heads of the independent agencies regulating financial markets expressed concern with S. 3468, stating that submitting their rulemakings to OIRA review "would give any President unprecedented authority to influence the policy and rulemaking functions of independent regulatory agencies and would constitute a fundamental change in the role of independent regulatory agencies." The independent regulators also warned that such a bill would prolong the rulemaking process and lead to unwarranted litigation against their rules.

(2) Ms. Sager: In 2003, GAO examined 85 major rules from health, safety and environmental agencies that underwent OIRA review. Of those 85 rules, GAO found that OIRA significantly modified 25, and those modifications had impacts on the rules' potential cost-benefit analyses. How would you characterize OIRA's communication with the agencies' and the public as to the genesis of those changes? Did you find that OIRA deferred to the agency's technical expertise about its own rules and statutory

authority? How often were the agencies forced to withdraw a rule as a result of OIRA's changes?

Answer: In our September 2003 report on rulemaking, we found that the Office of Management and Budget's (OMB) Office of Information and Regulatory Affairs (OIRA) had a significant effect on 25 of the 85 draft proposed and final rules from nine selected agencies that we reviewed for the report.[1] In 17 of the 25 rules, OIRA significantly changed the rule by recommending the revision, elimination, or delay of certain provisions in the draft regulatory text, the addition or revision of regulatory alternatives that provided more flexible and/or less costly compliance options, or the revision of agencies' cost and/or benefit estimates for the rules. OIRA returned 7 of the 25 rules to the agencies for reconsideration. OIRA also requested that one of the rules should be withdrawn by the agency. For 22 of the 25 rules that OIRA significantly affected, the changes appeared to have an effect on the costs and/or benefits of the rules or the agencies' estimates of those costs and/or benefits.

- OIRA communications on genesis of changes: Of the three categories of effects noted above (changes, returns, and withdrawals), OIRA only provided a public record of the rationale for its actions on the 7 returned rules, which it did through public "return letters" to the agencies. These returns for reconsideration were most often triggered by OIRA concerns about the quality of agencies' regulatory analyses, the cost-effectiveness of the proposed regulatory options, or interagency coordination issues. For the 17 changed rules, we had to rely on information about the changes that the regulating agencies included in their dockets, as directed by Executive Order

[1]GAO, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929 (Washington, D.C.: Sept. 22, 2003).

12866 (supplemented by interviews with agency officials). The order requires agencies to identify the substantive changes made during OIRA's review process (and those made at the suggestion of OIRA), but it does not require agencies or OIRA to identify the rationales for those changes. For withdrawn rules, the executive order requires neither OIRA nor the agency to document publicly the reasons for the withdrawals, but we obtained testimonial evidence from agency officials regarding the one rule withdrawn at OIRA's suggestion. The officials said that OIRA suggested this Federal Aviation Administration rule on repair stations be withdrawn due to "concerns from industry and the State Department."

- OIRA deference to agencies' technical expertise: Our September 2003 report generally discussed philosophical differences in how OIRA Administrators over time have viewed OIRA's role in the rulemaking process—in particular, the shifting opinions about whether OIRA should play a more collaborative consultative role in relation to the agencies or take on more of a "gatekeeper" role. We did not, however, address that issue in our analysis of OIRA's reviews of specific rules.
- How often agencies were forced to withdraw a rule as a result of OIRA's review: As noted above, we determined that 1 of the 25 rules had been withdrawn at the suggestion of OIRA or OMB. (Of the 85 total draft rules that we examined, regulatory agency officials also characterized 2 others as having been withdrawn based on "mutual decisions" made by their agencies and OIRA.)

For additional information regarding GAO's analysis, see chapter 3, appendix II and appendix III of GAO, *Rulemaking: OMB's Role in Reviews of Agencies' Draft Rules and the Transparency of Those Reviews*, GAO-03-929 (Washington, D.C.: Sept. 22, 2003).